United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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For the
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No. 13,483 599

SOL O. SCHLESINGER,
t/a Ideal Uniform Cap Company,

Appellant,

vs.

CHARLES S. THOMAS,
Secretary of the Navy,

Appellee.

APPEAL FROM A FINAL ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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No. 13,483

APPELLANT'S STATEMENT OF QUESTION PRESENTED

The question presented is whether the debarment of the appellant from receiving Government contracts was authorized by any statute or regulation, where such debarment was based on (a) the appellant's refusal to produce his books and records before a Congressional Committee by invoking his right to do so under the Fifth Amendment to the Constitution, and (b) a unilateral determination that appellant was in default on a Navy contract, which determination was the subject of an administrative appeal when the debarment was issued.

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No. 13,483

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Appellant,

vs.

CHARLES S. THOMAS,
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Appellee.

APPEAL FROM A FINAL ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The action in the United States District Court for the District of Columbia was brought by the appellant under authority of Section 10 of the Administrative Procedure Act, Act of June 11, 1946, c. 324, Sec. 10, 60 Stat. 243, U.S.C.A., Title 5, Sec. 1009, and under the general equity jurisdiction of that Court, District of Columbia Code (1951 ed.), Title 11, Sec. 305 and 306, for violation by the appellee, the Secretary of the Navy, of plaintiff's rights under the Fifth and Eighth Amendments to the Constitution of the United States and for violation of the provisions of Section 9 (a) of the Administrative Procedure Act, Act of June 11, 1946, c. 324, Sec. 9, 60 Stat. 242, U.S.C.A., Title 5, Sec. 1008 (a), (J.A. 1). The action sought a declaratory judgment pursuant to the

provisions of the Declaratory Judgment Act, Act of June 25, 1948, c. 646, 62 Stat. 964, as amended by Act of Aug. 28, 1954, c. 1033, 68 Stat. 890, U.S.C.A. Title 28, Sec. 2201-2, along with injunctive relief.

This Court has jurisdiction to hear this appeal from a final order of the United States District Court for the District of Columbia entered June 22, 1956, denying plaintiff's motion for summary judgment and granting defendant's motion for summary judgment (J.A. 58) under the provisions of the Act of June 25, 1948, c. 646, 62 Stat. 929, as amended by Act of October 31, 1951, c. 655, Sec. 48, 65 Stat. 726, U.S.C.A., Title 28, Sec. 1291.

STATEMENT OF CASE

This appeal is brought by the plaintiff below to review an order of the United States District Court for the District of Columbia granting a motion for summary judgment made by the appellee and denying a motion for summary judgment by the appellant. The complaint filed in the District Court on April 20, 1956, had requested a declaratory judgment and injunctive relief against the appellee, the Secretary of the Navy, to terminate the debarment and expunge from the records of the Navy Department a determination dated August 10, 1955, debarring the appellant from receiving Navy contracts until June 30, 1956 (J.A. 6-7), this determination reading as follows:

> "Dear Mr. Schlesinger:
>
> "The purpose of this letter is to advise you that you have been debarred from receiving Navy contracts until June 30, 1956, and that this debarment is effective throughout the Department of Defense. There are two reasons for this. First, your refusal to answer questions and to make your books and records available to the Investigations Subcommittee of the Permanent Committee on Government Operations of the U.S. Senate has thrown doubt on your right to

> continue to be eligible for Navy contracts. You have pleaded the Fifth Amendment in connection with an income tax investigation relating to the profits from a business, some 85% of which comes from the Government. At the very least, these facts create doubt as to whether you have paid all the taxes due on the profits which you have received from Government business, and until these doubts are resolved, I cannot, in good conscience, as trustee of the taxpayers' moneys and to prevent their waste, permit further Navy contracts to go to you.
>
> "The second ground for your debarment is that you are in default under Contract N140-62236s-54294B.
>
> Sincerely yours,
>
> S/ R.H. Fogler
> Assistant Secretary of
> the Navy (Material)"

The complaint also asked for a preliminary injunction, which was denied by the lower Court. This denial of a request for preliminary relief is not now in issue. After the denial of preliminary relief, and before an Answer was filed, appellant and appellee each moved for summary judgment on the grounds that the complaint and affidavits and exhibits submitted in support and in opposition to the motion for preliminary relief disclosed that there was no genuine issue of fact, and that only questions of law were presented (J.A. 56-57). The issues presented by this appeal are thus directed solely to the question of whether the lower Court's decision on the cross motions for summary judgment was correct.

It is pertinent to note that while the debarment which is the subject of the instant case has expired by its own terms, the effect of the debarment on the appellant's reputation has continued. Accordingly, if this Court agrees with appellant that the debarment was unauthorized and illegal, the appellant is entitled to a declaratory judgment to that effect and an appropriate direction to the appellee to expunge the debarment from the records.

The facts relating to the pleading of the Fifth Amendment are as follows: On June 23, 1955, the appellant appeared before the Permanent Subcommittee on Investigations of the Committee on Government Operations, United States Senate, as a witness in response to a subpoena issued to him by the said Subcommittee. The stated purpose of the Hearings was to study "the procurement practices of the Armed Services Textile and Apparel Procurement Agency, (Textile Procurement in the Military Services, Senate Report No. 1380, (84th Congress, 2nd Sessions, at page 1). At the hearing, the appellant made the following statement ("Textile Procurement in the Military Services," Hearings before the Permanent Subcommittee on Government Operations, United States Senate, 84th Congress, 1st Session, at p. 979):

> "Mr. Schlesinger: On the advice of counsel, I respectfully decline to turn over the books and records requested on the constitutional ground that so doing might tend to incriminate me. Some 7 months ago these identical books and records were demanded of me by the Intelligence Unit of the Internal Revenue Service, when they launched an investigation of my income-tax returns, an investigation that is still in progress. At the advice of my tax counsel, I respectfully decline to furnish these records on constitutional grounds. This stand has not been to this day challenged by the Treasury Department. I am now declining to furnish these records on the constitutional grounds that they may tend to incriminate. When I say that I do not mean to imply any disrespect to this committee, the Treasury Department or the laws of these United States, these laws, created out of the wisdom of years granted to me, and to all other citizens alike, as safeguards. In the exercise of these safeguards, both legally and historically, no implication of guilt is to be inferred. In the income-tax investigation, my lawyers advised that it would be prudent for me to refuse access to my books. I cannot consistently change that stand here with this committee without also changing it there. I have been advised that a waiver of my rights here would, in effect, simultaneously change it there."

The principal facts relating to the second ground for debarment, namely default under the contract, are set forth, in substance, in the Findings and Decisions rendered by the Armed Services Board of Contract Appeals made a part of the record below (J.A. 14-47).

The appellant had submitted a bid pursuant to the Navy's Invitation for Bid, on a procurement of 50,000 blue enlisted men's Navy caps (J.A. 19), and on May 3, 1955, he received a written award constituting the contract which was subsequently terminated for default (J.A. 20). The appellant was performing this contract when he was called before the Senate Subcommittee. Within a few days following that appearance, the Department of the Navy received a letter from Senator McClellan, chairman of the Subcommittee, which the Navy interpreted as "asking as to the status of the contract and implying that the contract should be cancelled" (J.A. 27). The Navy's Bureau of Supplies and Accounts, after learning that the caps were not urgently required, advised the Contracting Officer to find out whether the contract could be terminated for default (J.A. 27). On June 29, 1955, the Department of the Navy announced publicly that it was cancelling the contract (J.A. 56). The telegram advising the appellant that the contract was terminated for default was sent on July 1, 1955 (J.A. 28).

On July 28, 1955, the appellant appealed to the Secretary of the Navy from the termination decision (J.A. 30). This appeal was heard by the Armed Services Board of Contract Appeals and was denied by decision dated October 31, 1955 (J.A. 40, 42), and reconsideration was denied on December 20, 1955 (J.A. 47). While this appeal to the Armed Services Board of Contract Appeals was pending, the debarment notice was issued on August 10, 1955.

Thereafter, on April 9, 1956, appellant petitioned the Court of Claims alleging that the action of the Contracting Officer in terminating the contract for default was arbitrary and capricious and so grossly erroneous as to imply bad faith (J.A. 7-11). This action is still pending and undetermined.

On February 17, 1956, the Navy awarded a contract to Lumbermen's Mutual Casualty Company of Illinois, appellant's surety on the performance bond furnished on the terminated contract, calling for the surety to manufacture and deliver the requirements under the defaulted contract. Despite the fact that he had been debarred, the appellant was permitted by the Navy to manufacture the procured caps as the subcontractor of the surety company (J.A. 3).

Subsequent to the issuance of the debarment order, appellant bid on numerous Government requirements for caps and in each instance his bid was rejected because of the debarment (J.A. 12, 50). Since the appellant, his father and his grandfather had for a period of about 75 years continuously been suppliers of military headwear to the Government, and since Government work comprises over 85% of his business, the effect of the debarment was to cause serious and irreparable injury to his business (J.A. 1-2, 51). The debarment was publicized in the newspapers and was reported in the credit reports furnished by such credit-reporting agencies as Dun and Bradstreet with resultant injury to the appellant's business and credit reputation (J.A. 52-56). As a consequence, the appellant has been considered a poor moral risk, has been unable to obtain insurance and bonds and has had insurance policies cancelled (J.A. 51-52).

STATUTES AND REGULATIONS INVOLVED

1. Section 9(a) of the Administrative Procedure Act, Act of June 11, 1946, c. 324, Sec. 9, 60 Stat. 242, U.S.C.A. Title 5, Sec. 1008 (a) provides:

> "(a) In General - No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law."

2. Section 3 of the Armed Services Procurement Act of 1947, Act of Feb. 19, 1948, c. 65, Sec. 3, 62 Stat. 22, U.S.C.A., Title 41, Sec. 152, provides:

> "Sec. 3. Whenever advertising is required--
>
> "(a) The advertisement for bids shall be a sufficient time previous to the purchase or contract, and specifications and invitations for bids shall permit such full and free competition as is consistent with the procurement of types of supplies and services necessary to meet the requirements of the agency concerned.
>
> "(b) All bids shall be publicly opened at the time and place stated in the advertisement. Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: Provided, That all bids may be rejected when the agency head determines that it is in the public interest so to do."

3. Part 6, Section 1, Armed Services Procurement Regulations (1955 edition), 32 C.F.R. 1.600, et seq., is set forth in material part in the appendix hereto.

4. Section 7-103.12, Armed Services Procurement Regulations (1955 edition), 32 C.F.R. 7.103-12 sets forth the following clause required to be inserted in all fixed-price supply contracts of the Defense Department agencies:

> "Disputes
>
> "Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing

to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence, be final and conclusive; provided that, if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision."

STATEMENT OF POINTS

Since the District Court made no findings of fact or conclusions of law, it is assumed that each and every one of the appellant's arguments was overruled and that the Court agreed with the appellee's contentions.

1. The District Court erred in refusing to hold that the debarment constituted a sanction not authorized by law.

2. The District Court erred in ruling, in effect, that the Armed Services Procurement Regulations authorized the appellee to debar the appellant for having pleaded the Fifth Amendment in declining to answer the questions of a Senate Subcommittee.

3. The District Court erred in ruling, in effect, that the Armed Services Procurement Regulations authorized the appellee to debar the appellant because he was declared to be in default by a Navy Contracting Officer where there was no clear and convincing evidence of a violation of the contract provisions.

4. The District Court erred in refusing to hold that the debarment order issued while the question of default was the subject of an administrative appeal to be heard by appellee's representatives, was an arbitrary, capricious and discriminatory act.

5. The District Court erred in refusing to hold that the debarment was procedurally defective in failing to provide for a hearing and violated the appellant's Constitutional rights under the Fifth Amendment.

6. The District Court erred in refusing to hold that the appellant's Constitutional rights under the Eighth Amendment were violated by the infliction of cruel and inhuman punishment.

SUMMARY OF ARGUMENT

1. The appellant has been victimized by the unfortunate climate which exists today wherein persons seeking the protection of the Constitutional right against self-incrimination are considered confessed criminals. Appellant has not been charged with any violation of law, but is being persecuted by being debarred from Government contracts for pleading the Fifth Amendment.

2. There is no statutory authority which empowers the Secretary of the Navy to debar the appellant for pleading the Fifth Amendment or for being in default under a Navy contract. Congress has granted specific authority under several statutes to debar individuals and firms from Government contracts, none of which grants of authority authorize the debarment here in issue. In the face of these specific grants of authority, the direction contained in the Armed Services Procurement Act to award contracts to the lowest "responsible" bidder cannot be construed as authority to debar. The debarment constitutes a sanction and was intended as such. Lacking statutory authority to impose such a sanction, the Navy's debarment of appellant is forbidden by the Administrative Procedure Act.

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3. (a) The Armed Services Procurement Regulations do not authorize the debarment of an individual for having pleaded the Fifth Amendment. In this respect, the regulations authorize debarment only for conviction of a crime relating to procurement matters.

(b) Insofar as debarment is authorized by the regulations for failure to perform a contract, they prescribe that there must be clear and convincing evidence of a violation of the contract provisions. The facts relating to the terminated contract do not set forth clear and convincing evidence of violation of the contract, and, in addition, show that the default, if any, was neither material nor substantial. The facts further show that the termination for default was a result of pressure originating in appellant's having pleaded the Fifth Amendment.

4. (a) When the debarment was issued, to wit, August 10, 1955, there was an appeal pending from the Contracting Officer's decision terminating the contract for default. Accordingly, the decision terminating the contract for default was then lacking in finality and the reliance thereon by the appellee as a basis for debarment was arbitrary and capricious. The said decision is lacking in finality even today, because of appellant's petition to the Court of Claims alleging the Contracting Officer's decision was arbitrary, capricious and so grossly erroneous as to imply bad faith and not supported by the evidence.

(b) The facts relating to the contract indicate that time was not of the essence and the termination for default was an arbitrary and capricious act. The compounding of a termination for default of doubtful legality with a debarment is not contemplated by the Armed Services Procurement Regulation. The departure of the appellee from the applicable regulations to impose debarment was an arbitrary, capricious and discriminatory act.

5. The notice of debarment was procedurally defective in that it failed to provide an opportunity to the appellant to present information

in his own behalf, although the regulations provide for such an opportunity. Although the appellant, in response to his pleas for relief, did have conferences with Navy personnel, these conferences, coming after the debarment was in effect, did not provide a hearing of any type before the debarment was imposed. The Navy's failure to abide by the basic concepts of fair play violated the due process provisions of the Fifth Amendment.

6. The debarment has constituted cruel and inhuman punishment upon the appellant contrary to the provisions of the Eighth Amendment.

ARGUMENT

I. Preliminary Statement

The issue which underlies the litigation before this Court is the direct result of the present political climate. It is an unfortunate by-product of the desire to protect our national interest by locating and routing communists and their sympathisers out of all Government contacts. The much-abused and highly publicized "Fifth Amendment pleader" is now considered in many circles to be a confessed criminal.

The entire purpose of the founding fathers in making the Bill of Rights an integral part of our Constitution would be lost if inferences were permitted to result from anyone's resorting to its protection. The cornerstone of our common law, that a person is presumed to be innocent unless proven guilty, is undermined by these unwarranted inferences. Officers of the Government should be second to none in their devotion to these sacred precepts.

The appellant is a victim of the hysteria of the times. In a Congressional hearing, he declined to produce requested books and records because he had previously declined to do so in connection with an income tax investigation, and had been advised by counsel that compliance with

the Committee's request would constitute a waiver of his rights under the Fifth Amendment. If appellant has violated any laws, he should be prosecuted for such violations, but he should not be persecuted because he feared he might have violated some law. It is noteworthy that the appellant has at no time, either prior to the debarment or since the debarment, been accused of or charged with the violation of any law, civil or criminal, nor has he been charged with contempt of Congress.

The record in regard to the debarment is noteworthy for the undue haste to punish the appellant. The Contracting Officer admitted that he had decided to terminate the contract with appellant for default a day before the appellant could have been in default (J.A. 28, 40). Within a week following the appellant's appearance before the Senate Committee, the Navy announced on June 29, 1956, that it was moving to cancel the contract and to place the appellant on the list of debarred concerns (J.A. 56). The Navy's Bureau of Supplies and Accounts directed the Contracting Officer to terminate immediately the contract for default about 12 hours before the contract could have been in default (J.A. 28). The Secretary of the Navy debarred the appellant without a hearing and without waiting for the default to become final and conclusive (J.A. 2-3).

In the face of this indicated bad faith and lack of due process, the appellant turns to this Court for protection and relief. The appellant looks to the Court to reaffirm the principle that ours is a Government of laws and not of men.

II. The debarment constituted a sanction which is not authorized by any law, and its imposition contravened the prohibitions of the Administrative Procedure Act.

In considering the authority which might empower the Department of the Navy to debar the appellant, it is appropriate to observe that the notice of debarment set forth no specific authority under which the appellee's representative purported to act. It is the appellant's position that there was, in fact, neither statutory authority nor even regulatory authority which gave the appellee the right to debar the appellant. Lacking statutory authority to debar the appellant, the debarment was in violation of law.

Section 9 (a) of the Administrative Procedure Act, supra, in unequivocal language, states:

> "No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law."

That debarment constitutes a sanction was recognized by the Attorney General's Committee on Administrative Procedure whose extensive study comprised part of the background considerations which led ultimately to the enactment of the Administrative Procedure Act. The Committee stated, in discussing the Walsh-Healey Act:

> "Section 3 adds a dire sanction in the form of a direction that no Government contract shall be awarded to one who has been found by the Secretary of Labor to have violated the Walsh-Healey Act, until 3 years have passed . . . The withholding of Government business may be an exceedingly drastic, if not altogether ruinous penalty. It has been so recognized by the Secretary and accordingly been little employed . . . the penalty of blacklisting is so severe that its imposition may destroy a going business . . ." Administrative Procedure in Government Agencies, 76th Congress, 3rd

> Session, Senate Document No. 186 - Monograph of the Attorney General's Committee on Administrative Procedure, Part 1, Division of Public Contracts (1940) at page 2.

The facts herein make it apparent that the quoted observation was not fanciful. The appellant, almost immediately after the debarment, was met with refusals by bonding companies and insurance companies to do business with him, and his existing policies of fire insurance were cancelled because appellant was considered a poor moral risk because of the debarment (J.A. 51-52). This condition continued even to the point where the appellant was forced to file a cash deposit to secure costs on this appeal because he was refused a bond. In effect, appellant has been deprived of some of the "working tools" of industry.

The nature of appellant's business is unique and, because of its extreme specialization, no manufacturer of uniform caps could survive if he were ineligible to receive an award based on a procurement of military caps by the Armed Forces. Prior to the debarment, 85% of appellant's business was with the Government (J.A. 11). The appellant had repeatedly bid on military cap procurements after his debarment, and on several procurements had been the low bidder. His bids, in each instance, were disregarded because of the debarment (J.A. 12, 50).

That the debarment constituted a penalty or sanction was recognized by the subcommittee before whom appellant testified. In the Report of the Committee on Government Operations entitled "Textile Procurement in the Military Services," Senate Report No. 1380, 84th Congress, 2nd Session, ordered to be printed January 16, 1956, there is contained the following statement (p. 9):

> "As a result of the investigation, the Department of Defense took disciplinary action against both contractors and Defense Department personnel who were guilty of improprieties.

"The following contractors were placed on the consolidated list of debarred, ineligible, and suspended contractors:

Suspended

(a list of 12 names follows)

* * *

Debarred

Schlesinger, Sol Owen, dba Ideal Uniform Cap Co." (Emphasis supplied.)

The only charge set forth in the Senate report against the appellant was his plea of the Fifth Amendment (p. 8). Thus, the Senate Committee recognized that the debarment was punishment for the appellant's having pleaded the immunity of the Fifth Amendment to the Constitution.

The fact that the debarment was for a limited period of time, in itself, is indicative of the punitive nature of the action. The debarment was calculated to punish the defendant by depriving him of Government contracts, and it did not provide any benefits to the Government. Clearly, this was the type of action which Congress, by the Administrative Procedure Act, meant to foreclose except in those situations where Congress had provided specific authority for an administrative agency to do so.

The imposition of sanctions, as well as all unauthorized assumptions of power, by administrative agencies has been critically examined by the courts and stricken down where an administrative agency lacked authority to impose them. In Stanard v. Olesen, (1954), 74 S. Ct. 768, Justice Douglas, sitting as a Circuit Justice, criticized the impounding of mail advertising matter of an obscene character at the beginning of an administrative proceeding although the pertinent legislation permitted such impounding after a hearing. He commented that:

"Impounding one's mail is plainly a 'sanction' for it may as effectively close down an establishment as the sheriff himself."

Subsequently, in Olesen v. Stanard, (CA-9, 1955), 227 F.2d 785, the impounding order issued after the administrative hearing was held to have been erroneously issued because the only evidence before the administrative agency was material which advertised the obscene matter, but which was not in itself obscene. The Court noted that the impounding of mails was a sanction which could only be issued within the authority granted to the Postmaster General by the statute.

In United Electrical, Radio and Machine Workers, et al. v. Herzog, et al., (D.C.D.C., 1953), 110 F. Supp. 220, 222, affirmed as Farmer v. United Electrical, Radio and Machine Workers, (1953), 93 App. D. C. 178, 211 F. 2d 36, cert. denied 347 U. S. 943, the action of the National Labor Relations Board in demanding answers to questionnaires in order for the Union to continue to be in compliance with the filing provisions of the National Labor Relations Act was enjoined. The action of the Board was held "to declare a sanction if the questionnaires were not fully answered. Such an assumption of power is not authorized in the Act and was not intended by Congress."

In International Fur and Leather Workers Union v. Farmer, (D. C. D. C. 1953), 117 F. Supp. 35, affirmed 95 App. D. C. 308, 221 F. 2d 862 (1955), the doctrine of the United Electrical Workers case, just cited, was followed even though one of the Union officials was then under indictment for filing a false affidavit with the National Labor Relations Board. This Court observed in affirming (95 App. D. C. at p. 309):

> "Congress explicitly provided a criminal penalty for false non-Communist affidavits. It assumed that this threat of criminal sanctions would be a sufficient deterrent to false swearing by union officers. If these sanctions have proved insufficient, it is for Congress, not the Board, to provide new ones."

In Peters v. Hobby, (1955), 349 U. S. 331, the assumption by a Loyalty Review Board of the authority to review an Agency Board's decision favorable to Peters was held to be an unwarranted assumption

of power not granted to it by the Executive Order under which it purported to act. It was further held by the Supreme Court that the debarment of the petitioner from all "federal employment" for a period of three years was also an unwarranted assumption of power since the Civil Service Rules under which the Board purported to act provided only that an employee could be barred from the competitive service. Interestingly, although the Court declined to reinstate the petitioner because his appointment had expired while the case was pending, it directed the District Court to issue an order to the Executive agency to expunge the Review Board's finding as to petitioner's loyalty and as to his debarment from federal employment.

The basic authority for the Department of the Navy to contract is contained in the Armed Services Procurement Act, Act of Feb. 19, 1948, c. 65, 62 Stat. 21, U.S.C.A. Title 41, Sec. 151 et seq. At no place in the act is there contained any authority for debarment of contractors. Despite this fact, the appellee, in the Court below, argued that debarment authority was implied by the provision of the act (Section 3; U. S. C. A., Title 41, Sec. 152) stating that awards after advertising shall be made "to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered." This provision constitutes a specific direction to procurement agencies to award advertised contracts to the lowest responsible bidder in each instance. It is noteworthy that no similar provisions are contained in the act as to negotiated procurements. This provision cannot be construed to authorize a blanket debarment as to all Government contracts. Farmer v. United Electrical Radio and Machine Workers, supra.

Examination of other statutes indicates that in every case in which Congress has meant to confer authority on administrative officials to debar contractors, it has specifically stated such authority. Indeed, the Armed Services Procurement Regulations at Sec. 1-602 (quoted in

Appendix A) set forth three statutes conferring such authority to debar contractors: the Walsh-Healey Act, Act of June 30, 1936, c. 881, Sec. 3, 49 Stat. 2037, U.S.C.A., Title 41, Sec. 37; the Davis-Bacon Act, Act of Mar. 3, 1931, c. 411, Sec. 3, 46 Stat. 1494, as amended Aug. 30, 1935, c. 825, 49 Stat. 1011, U.S.C.A., Title 40, Sec. 276a-2; and the Buy American Act, Act of March 3, 1933, c. 212, Title III, 47 Stat. 1520, U.S.C.A., Title 41, Sec. 10b (b).

The Walsh-Healey Act, which relates to fair labor standards, in effect, provides for the Secretary of Labor to advise the Comptroller General of firms and persons who have breached agreements or representations required by the Act, and for the Comptroller General to circulate these names to Government agencies so that Government contracts shall not be awarded to such persons or firms. The Davis-Bacon Act, relating to wage rates to be paid on Government construction projects, contains authority to debar from Government contracts contractors who have failed to pay laborers and subcontractors. Violators of certain provisions of the Buy American Act are likewise subject to debarment from Government contracts under the provisions of the statute.

Under authority delegated by Congress in Reorganization Plan No. 14 of 1950, the Secretary of Labor has authority to issue regulations relating to fair labor standards applicable to construction projects undertaken with federal funds or assistance, including authority to issue regulations for debarment as set forth in the Walsh-Healey Act and Davis-Bacon Act. The eight statutes set forth in the Reorganization Plan No. 14 of 1950, eff. May 24, 1950, 64 Stat. 1267, 15 F.R. 3176, set forth at U.S.C.A., Title 5, note following Sec. 133z-15, are commonly known as: the AntiKickback Law; the Eight-Hour Law; the Hospital Survey and Construction Act; the National Housing Act; the Housing Act of 1949; the School Survey and Construction Act; the Federal Airport Act; and the Defense Housing and Community Facilities and Services Act. The Walsh-Healey Act and the Davis-Bacon Act, if otherwise applicable, are

specifically made applicable to negotiated contracts awarded under the Armed Services Procurement Act, supra, U.S.C.A., Title 41, Sec. 157.

In the face of specific grants by Congress to executive agencies of the right to debar bidders for specific causes, the absence of a legislative expression by Congress to debar bidders for pleading the Fifth Amendment or for being in default, or even for not being responsible, is meaningful. There is, in fact, no statutory authority for the debarment herein for the causes stated.

While it is true that Perkins v. Lukens Steel Co., (1940) 310 U.S. 113, seemingly vests broad discretion in administrative officers in conducting procurement activities, it is significant that the Administrative Procedure Act followed that decision by some six years and that the Act made no exception as to applicability thereof to procurement activities of the executive agencies. The Lukens decision is further distinguishable by the fact that the plaintiffs there were seeking to enjoin the exercise by the Secretary of Labor of a power expressly conferred by Congress, and further by the fact that the plaintiffs were complaining of some acts which did not necessarily apply to them.

The appellant here does not seek to force the award of any contract to him, nor to enjoin any exercise of discretion by the appellee which appellee is empowered by statute to do. It is pertinent to observe that in Perkins v. Elg, (1939), 307 U.S. 325, 350, the Supreme Court noted that a decree which declared Miss Elg to be a natural-born citizen "would in no way interfere with the exercise of the Secretary's discretion with respect to the issue of a passport but would simply preclude the denial of a passport on the sole grounds that Miss Elg had lost her American citizenship." In the instant case, a decree that the debarment was an unauthorized and illegal sanction would in no way restrict the appellee's discretion in awarding or not awarding the contracts to the appellant.

III. The action of the Department of the Navy in debarring the appellant was not authorized by any administrative regulation governing the Department of the Navy.

In addition to there being no statutory authority for debarring the appellant, the debarment for the causes stated was not authorized by the administrative regulations governing the Department of the Navy in its procurement activities, to wit, the Armed Services Procurement Regulations (hereinafter sometimes referred to as ASPR) promulgated by the Department of Defense, 32 C. F. R. 1.100 et seq., issued under authority of the Armed Services Procurement Act of 1947, supra. Part 6 of Section 1 of these regulations, 32 C.F.R. 1.600, set forth in material part in Appendix A, provides for debarments by the Secretary of a department for the following causes (Sec. 1-604.1):

(a) Conviction of fraud or a criminal offense as an incident to obtaining, attempting to obtain or in the performance of a contract, and of violating the Federal antitrust statutes in submitting bids or proposals.

(b) Clear and convincing evidence of violation of contract provisions, as set forth below, when regarded by the Secretary of the Department involved or his authorized representative as so serious as to justify debarment actions:

(1) Wilful failure to deliver.
(2) A history of failure to perform or of unsatisfactory performance as to one or more contracts, except that failure to perform caused by acts beyond the control of the contractor shall not be considered.
(3) Violation of contractual provisions against contingent fees.
(4) Violation of contractual provisions against gratuities.

(c) Debarment by any other Executive agency.

A. First Ground for Debarment

There is no provision in the regulation for debarment because a contractor has pleaded the Fifth Amendment. The regulation, insofar as debarment for criminal activity by the contractor is concerned, makes conviction a prerequisite to debarment and further states that the conviction must be of a crime related to procurement activities.

It is significant to note that the Supreme Court has found it necessary as recently as last term to remind us that we may not assume that a witness who pleads the immunity against self-incrimination afforded by the Fifth Amendment to the Constitution is a criminal. In Ullmann v. United States, (1956), 350 U. S. 422, 426, Justice Frankfurter said:

> "Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to the patriots who sponsored the Bill of Rights."

And in Slochower v. Board of Education, (1956), 350 U. S. 551, 557, the Court added that "a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing."

It is noteworthy that the appellant has at no time, either prior to the debarment or since the debarment, been accused or charged with the violation of any law, civil or criminal, nor has he been charged with contempt of Congress. Clearly, the administrative regulation provided no authority for the debarment for the appellant's having pleaded the Fifth Amendment.

B. Second Ground for Debarment

The second ground for the debarment was stated in the notice of debarment as follows (J.A. 7):

> "you are in default under contract N 140-62236s-54294B."

The facts relating to the terminated contract cast considerable doubt on the validity of this ground for debarment. The Contracting Officer requested five extensions of time for acceptance of appellant's bid. Finally, when appellant received the written award on May 3, 1955, based on his bid dated February 24, 1955, he found that the Navy had unilaterally established a delivery schedule requiring him to commence monthly deliveries on May 31, 1955. On June 14, 1955, the Contracting Officer inquired of appellant as to the status of the contract and on June 30, 1955, received appellant's reply. In the period between June 14, 1955, and June 30, 1955, the appellant had appeared before the Senate Subcommittee and declined to produce his records. Following this appearance, the Navy's Bureau of Supplies and Accounts directed the Contracting Officer to determine the status of the contract and determine whether it could be terminated because the Navy had concluded that the chairman of the Senate Subcommittee had "implied" that the appellant's contract should be cancelled. After the Contracting Officer ascertained that the caps were for a reserve stock and not urgently required, he was directed by his superiors to terminate the contract for default (J.A. 19, 20, 21-22, 24-28.).

The record, including the findings of the Armed Services Board of Contract Appeals makes it very clear that the Navy decided to terminate the contract for default before the first deliveries were due [1] and before it received the appellant's letter (which it admittedly had on June 30, 1955) in order to "cooperate" with the Senate Subcommittee (J. A. 27-28, 55-56). It is also clear from the record that the appellant was making progress towards completing the contract when it was terminated, and that he had 3,000 to 4,000 caps completed and 19,000 caps in various stages of manufacture two days before the termination (J.A. 24, 27-28). Even on July 1, 1955, when deliveries were due,

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[1] The Armed Services Board of Contract Appeals found that the failure to deliver on May 31, 1955, was without appellant's fault or negligence, that, in the Board's opinion, the May 31, 1955, delivery date was waived by the Contracting Officer and that the only default was the failure to deliver by June 30, 1955 (J.A. 39-40).

there was a reasonable prospect that the appellant could make deliveries within a reasonably short time. Certainly, there is nothing in the evidence constituting "clear and convincing evidence of violation of contract provisions" in the failure to perform the contract as would justify the debarment under Section 1-604.1(b) of the regulation, 32 C. F. R. 1.604.1(b). On the other hand, there is substantial evidence that the appellant was working assiduously to perform the contract and that, assuming arguendo, he was in default, the default was not material and substantial.

The materiality or substantiality of a default will depend largely on whether time is of the essence. In contracts for supplies and services, the current view is that time is not of the essence unless it is apparent from all of the circumstances that time is a material factor. Corbin on Contracts (1951 edition) Vol. 3 Sec. 713, 715, 718, 719; Bradford Novelty Co. v. Technomatic, Inc. (1955), 142 Conn. 166, 112A.2d 214, cf. P. M. Risik "Defaults in Federal Government Contracts," XIV Fed. Bar Journal (Oct. - Dec. 1954) at page 347.

It is highly significant that the Department of the Navy announced on June 29, 1955, that it was moving to cancel the contract and to place the appellant on its list of "debarred" concerns (J.A. 56). On that date, the appellant was not in default (J.A. 39-40). We submit, the appellee has acted in debarring the appellant beyond even the broad authority granted to him by the Armed Services Procurement Regulations.

It is interesting to observe that despite the Navy's action is debarring the appellant because, in effect, it felt he was unsuitable as a Navy supplier, the 50,000 caps in question were ultimately manufactured for and delivered to the Navy by the appellant. On February 17, 1956, the Navy awarded a contract for the reprocurement of the caps called for by the terminated contract to appellant's surety on the terminated contract. With the approval of the Navy, the surety company subcontracted the performance of all the work to the appellant (J.A. 3, 12).

IV. The action of the appellee in debarring the appellant was arbitrary, capricious and discriminatory.

The notice of termination of the contract with appellant for default was sent to appellant on or about July 1, 1955. Thereafter, on July 28, 1955, the appellant appealed to the Secretary of the Navy from the termination for default (J. A. 28, 30). This appeal was not decided until October 31, 1955, and reconsideration was denied by the Armed Services Board of Contract Appeals on December 20, 1955 (J.A. 42, 47). On April 9, 1956, the appellant petitioned the Court of Claims alleging that the action of the Contracting Officer was arbitrary and capricious and so grossly erroneous as to imply bad faith (J.A. 7). While the appeal to the Armed Services Board of Contract Appeals was pending, the debarment notice dated August 10, 1955, was issued.

The terminated contract contained the standard disputes clause used in Government contracts providing that the decision of the Contracting Officer on a disputed question of fact shall be final and conclusive unless the contractor files a written appeal with the Secretary of the department within thirty days after receipt of the disputed decision. The clause requires that the Secretary or his duly authorized representative shall decide the dispute and that his decision shall be final unless found by a court of competent jurisdiction to have been fraudulent or capricious or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. Sec. 7-103.12 ASPR, 32 C. F. R. Sec. 7.103-12, quoted at p. 7, supra.

Under the provisions of the disputes clause, the decision terminating the contract for default was not a final decision at the time the debarment notice was issued. Indeed, since the appellant filed his petition with the Court of Claims contesting the finality of the Contracting Officer's decision on April 9, 1956, which case has been pending for the entire period that the instant case has been before the District Court and this Court, the decision of the Contracting Officer is still not final. Despite

this lack of finality, the appellee's representatives have used the Contracting Officer's decision as grounds for the debarment. We submit that the administrative regulations do not contemplate that a debarment shall issue where the facts alleged as a basis for the action are the subject of a dispute between the Government and the contractor.[2]

Aside from any consideration of finality or conclusiveness, the facts relating to the termination make it apparent that the termination for default was an arbitrary and capricious act, and a gross abuse of discretion. In Penner Corp. v. United States, (1950), 116 C. Cls. 550, 563, 565, 89 F. Supp. 545, 547, 548, aff. 340 U. S. 898, the Court of Claims held that a Contracting Officer, although he is a representative of the Government, must act "as an impartial, unbiased judge" in deciding questions under the disputes clause. "The duty to act impartially was imposed upon him by the contract." In the light of the facts disclosed in the proceedings before the Armed Services Board of Contract Appeals that the decision to terminate the contract for default was made before the contract was in default, and the announcement of the Navy on June 29, 1955, that it intended to cancel the contract, there are grave doubts whether the Contracting Officer did act impartially in deciding to terminate the contract for default before delivery was actually due (J. A. 28, 40, 56).

In United States v. Lennox Metal Manufacturing Co, (CA-2, 1955), 225 F. 2d 302, 318-319, the Court denied recovery to the Government on a damage claim where the Contracting Officer arbitrarily exercised the right to terminate a contract, saying:

> ". . . where the power of the Government under a contract is complete and its agent's decision conclusive, then the government owes a corresponding duty to have its agent's judgment exercised reasonably, and not capriciously or in bad faith. * * *"

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[2] It is appropriate to observe that, since the Secretary was duty bound to hear the appeal from the termination for default, his decision debarring appellant for default amounted to prejudging the contract appeal.

> "True, the new statute, [41 U. S. C. 321] literally read, applies only to the "disputes" clause of a contract like that before us here. Congress, however, stated a general policy forbidding a government official to act capriciously in the exercise of a power of decision under such a contract. Such a policy should not be interpreted in a niggardly manner. * * *"

The Navy implemented its decision to terminate the appellant's contract for default on the day following the day deliveries were due. There is compounded conclusive evidence that time was not of the essence. The Contracting Officer waited 67 days after the bids were opened to make an award, during which period, on five consecutive occasions he asked the appellant for, and was given, extensions of time in which to accept the appellant's bid (J.A. 19-20). In addition, there had been a waiver of the delivery schedule (J.A. 39-40). By no stretch of the imagination can the default be termed material and substantial, which, as we previously noted (at p.23 supra), it must be to justify a termination for default.

Considering the delay of the Government in making the award initially, the fact that the caps were not urgently required (J. A. 27) and the fact that after termination the Government waited until February 17, 1956, to reprocure the item (J. A. 3), brings to mind the language of the Supreme Court in Priebe & Sons v. United States, (1947), 332 U. S. 407, 413, in striking down an assessment of liquidated damages where the Government had no actual injury. The Court said "an exaction of punishment for a breach which would produce no possible damage has long been deemed oppressive and unjust."

The compounding of a termination for default of doubtful legality with the penalty of debarment is certainly not contemplated by the language of the regulations (ASPR 1-604.1). We think that the conclusion is inescapable that there was no basis for the debarment in the administrative regulations for either of the reasons set forth in the debarment notice. The departure by the appellee from the

administrative regulations to impose debarment upon the appellant was arbitrary, capricious and discriminatory, and an abuse of administrative discretion. United States ex rel Knauff v. McGrath, (CA-2, 1950), 181 F. 2d 839, 841, reversed and ordered dismissed because moot, 340 U. S. 940 (1951).

V. The debarment was procedurally defective.

The debarment was procedurally defective under the applicable administrative procedures, since ASPR 1-604.3, 32 C. F. R. Sec. 1.604-3, provides that "the notice shall also afford the contractor a reasonable opportunity to present information for consideration in his behalf." The notice failed to provide an opportunity for the appellant to present information in his behalf or to have the same considered. The language of the regulation, while not entirely clear, does seem to contemplate that there will be an opportunity for the contractor to state his position before the debarment is effective.

The appellee attempted to dodge this issue by claiming that the appellant was allowed to state his position in conferences held with appellant by Navy personnel (J. A. 48-49), although appellee concedes that there was no provision in the notice for any hearing. The conferences with Navy personnel resulted from voluntary approaches by the appellant made sometime after the debarment became effective, and, in effect, were pleas for relief by the appellant. In addition to seeking relief from the Navy, the appellant wrote letters of protest to the Comptroller General who kept the matter under consideration from August 15, 1955, until March 1, 1956, when he denied the request that the debarment be set aside (J.A. 2).

As previously stated, the effect of the debarment has been such that the appellant has been deprived of his right to pursue his normal and usual occupation. The arbitrary and discriminatory action in debarring the appellant without a hearing is so contrary to every concept of fair play that it hardly seems necessary to state that there has been a

violation of the due process provisions of the Fifth Amendment. In Wong Yang Sung v. McGrath, (1950), 339 U. S. 33, 49, the Supreme Court said:

> "The Constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate and, where applicable, permeates every valid enactment of that body."

In Morgan v. United States, (1938), 304 U. S. 1, 22, the Court, in invalidating an administrative order which was entered by the head of a department without a hearing by him, said that administrative agencies:

> ". . . must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

In Sheridan-Wyoming Coal Co. v. Krug, (1949), 84 App. D. C. 288, 293, 172 F. 2d 282, 287, rev. on other grounds 338 U. S. 621, this Court stated that an administrative regulation published in the Federal Register was one of general applicability and legal effect and was binding on the administrative officer until repealed or modified. It follows that the failure of the appellee to provide in the notice for the appellant to state his position and the failure to provide an opportunity for the appellant to state his position before the debarment took effect, made the debarment fatally defective.

VI. The debarment has resulted in cruel and inhuman punishment contrary to the Eighth Amendment.

It has been clearly demonstrated that the debarment herein was intended and is, in fact, a form of punishment. It constituted a type of unauthorized sanction prohibited by the Administrative Procedure Act. The results of the appellee's action, while not necessarily intended as such, constitute cruel and inhuman punishment prohibited by the Eighth Amendment.

While we know of no case specifically supporting this statement, it has long been recognized that economic and mental punishment can be equally as cruel and inhuman as physical punishment. In Cummings v. Missouri, (1866) 4 Wall. 277, 320, the Supreme Court stated that:

> "The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of deprivation determining this fact."

See also Ex parte Garland, (1866) 4 Wall. 333, 377.

The debarment carries with it an inference of guilt in the commission of a commercial crime, i.e., bribery, fraud, etc. It carries with it a permanent taint of unreliability, untrustworthiness and dishonesty. It is sufficient to cause a person to be treated as a serious moral risk. It reduces, if not eliminates, the ability of a person to get credit, insurance coverage, surety bonds, and even a job. The harmful repercussions are apparent in many instances, and in others, equally deleterious without ever being ascertained.

To a businessman, this type of punishment is perhaps crueler and more inhuman than the lash of a whip to an individual, for it is continuous and perpetual. This debarment constitutes cruel and inhuman punishment not sanctioned by law, not for the commission of a crime, but solely because of the exercise of a constitutional prerogative. As such, it is repugnant to the letter and spirit of the Eighth Amendment.

CONCLUSION

This case clearly demonstrates the extremes to which an administrative agency can go if it is unrestrained by the Courts. Without authority of any statute, the Department of the Navy chose to set itself up as an instrument to chastise the appellant for having refused under his Constitutional rights to produce his books and records. In adopting the Administrative Procedure Act, Congress seemingly recognized that

administrative officers must not be allowed to be carried away by their zealousness, and it wisely inserted the provision forbidding the imposition of sanctions except when authorized by law. The authorization to debar a contractor for pleading the Fifth Amendment or for being in default under a contract is not contained in any law, and that sanction, therefore, is proscribed by the Administrative Procedure Act.

The debarment of the appellant for pleading the Fifth Amendment or for being in default where such default is not material and substantial is not authorized by any regulation governing the appellee and, accordingly, it is unauthorized. The action of the appellee in debarring the appellant was arbitrary, capricious and discriminatory. Moreover, the imposition of the debarment was lacking in procedural due process and, accordingly, violated the appellant's rights under the Fifth Amendment to the Constitution. Inasmuch as the debarment constituted cruel and inhuman punishment, it constituted a violation of the Eighth Amendment to the Constitution.

The appellant is entitled to a declaratory judgment that the debarment was contrary to law and unauthorized and to an order directing that the records of the Navy Department be corrected to expunge the debarment therefrom.

Respectfully submitted,

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APPENDIX - A

The pertinent portions of Part 6, Section 1 of the Armed Services Procurement Regulations (1955 edition), 32 C. F. R. 1.600, et seq., are as follows:

"PART 6 - DEBARRED, INELIGIBLE, AND SUSPENDED BIDDERS

"1-600 SCOPE OF PART. This part prescribes policies and procedures relating to the debarment of bidders for any cause, ineligibility of bidders under section 1a of the Walsh-Healey Public Contracts Act (41 U. S. Code 35a), and the suspension of bidders for alleged fraud or other criminal conduct.

"1-601 ESTABLISHMENT AND MAINTENANCE OF A LIST OF FIRMS OR INDIVIDUALS DEBARRED OR INELIGIBLE.

1-601.1 General. Each Department shall establish and maintain a consolidated list of firms and individuals to whom contracts will not be awarded and from whom bids or proposals will not be solicited, in accordance with the provisions of this Part 6.

* * *

"1-602 BASIS FOR ADDITION OF FIRMS AND INDIVIDUALS ON LIST.

The names of firms or individuals shall be included on the list in the following categories:

(a) Those listed by the Comptroller General in accordance with the provisions of section 3 of the Walsh-Healey Public Contracts Act (41 U. S. Code 37), which have been found by the Secretary of Labor to have violated any of the agreements or representations required by that Act.

(b) Those listed by the Comptroller General in accordance with the provisions of section 3 of the Davis-Bacon Act (40 U. S. Code 276a-2(a)), as found by the Comptroller General to have violated said Act.

(c) Those which the Secretary of a Department or his authorized representative determines to debar administratively for any of the causes and under all of the conditions set forth in ASPR 1-604.

(d) Those determined by the Secretary of a Department in accordance with section 3 (b) of the Buy American Act (Public Law 428, 72d Congress; 47 Stat. 1520; 41 U. S. Code 10b (b)), to have failed to comply with the provisions of section 3(a) of that Act under any contract containing the specific provisions required by said section 3(a) and made by the Department for construction, alteration, or repair of any public building or public work.

(e) Those found by the Secretary of Labor ineligible to be awarded contracts for the reason that they do not qualify as "manufacturers" or "regular dealers" within the meaning of Section 1 (a) of the Walsh-Healey Public Contracts Act (Public Law 846, 74th Congress; 49 Stat. 2036; 41 U. S. Code 35 (a)).

(f) Those which the Secretary of a Department or his authorized representative determines to suspend under the conditions set forth in ASPR 1-605.

* * *

"1-604 CAUSES AND CONDITIONS UNDER WHICH DEPARTMENTS MAY DEBAR CONTRACTORS. The Secretary of each Department or his authorized representative is authorized to debar in the public interest a firm or an individual for any of the causes and under all conditions set forth below. Debarment of a firm or individual by the Secretary of a Department or his authorized representative shall operate to debar such firm or individual throughout the Department of Defense.

"1-604.1 Causes for Debarment.

(a) Conviction by or a judgment obtained in a court of competent jurisdiction for (i) commission of fraud or a criminal

offense as an incident to obtaining, attempting to obtain, or in the performance of a contract; and (ii) violation of the Federal antitrust statutes arising out of the submission of bids or proposals. In the event appeal taken from such conviction or judgment results in reversal, the debarment shall be removed upon receipt of notification thereof. (Note, however, that the foregoing do not necessarily require that the firm or individual be debarred, and that the decision to debar is still within the discretion of the Secretary of the Department concerned, or his authorized representative. The seriousness of the offense, the civil satisfaction received by or available to the Government, and all mitigating factors should be considered in making the determination to debar.)

(b) Clear and convincing evidence of violation of contract provisions, as set forth below, when such violations are of a character regarded by the Secretary of the Department involved, or his authorized representative, to be so serious as to justify debarment actions:

(1) Wilful failure to deliver in accordance with the specifications or within the times of delivery provided in a contract.

(2) A history of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts, provided that the previous failure or failures by the Contractor are within a reasonable period of time preceding the determination to debar. Failure to perform caused by acts beyond the control of the Contractor shall not be considered.

(3) Violation of the contractual provision against contingent fees.

(4) Violation of the contractual provision against gratuities, as determined by the Secretary of a Department

in accordance with the provisions of the GRATUITIES clause.

(c) Debarment for any of the above causes by some other executive agency of the Government. Such debarment may be based entirely upon the record of facts obtained by the original debarring agency, or upon a combination of additional facts with the record of facts of the original debarring agency.

"1-604.2 Period of Debarment. All debarments shall be for a reasonable, definitely stated period of time, commensurate with the seriousness of the offense. As a general rule, a period of debarment shall not exceed 5 years following the date of conviction for fraud or other criminal offense, or 3 years following the date of debarment for any other cause. In the event debarment is preceded by suspension, consideration will be given to such period of suspension in determining the period of debarment.

"1-604.3 Notice of Debarment.

(a) The firm or individual concerned shall be furnished with written notice of the debarment within 30 days after determination of debarment has been made. The notice shall state, as a minimum, (i) the period of debarment, including effective dates: (ii) the reasons for debarment, including a statement of the specific instances of derelection; and (iii) that the debarment is effective throughout the Department of Defense. The notice shall also afford the contractor a reasonable opportunity to present information for consideration in his behalf.

(b) Copies of the notice of debarment action taken under the authority of subparagraphs (c) and (d) of ASPR 1-602 and of any removals from such debarments shall be furnished to the General Services Administration."

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JOINT APPENDIX

PLEADINGS AND DOCUMENTARY EVIDENCE

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

1 [Filed April 20, 1956]

SOL O. SCHLESINGER, t/a Ideal Uniform Cap Company, 30 East Merrick Road Freeport, New York, Plaintiff,	)	
v.	)	Civil Action No. 1647-56
CHARLES S. THOMAS, Secretary of the Navy Washington, D.C. Defendant.	)	

COMPLAINT FOR DECLARATORY JUDGMENT AND FOR INJUNCTIVE RELIEF

1. This action for a declaratory judgment and injunctive relief, pursuant to the provisions of 28 U.S.C. Sections 2201 and 2202, is brought against the defendant as chief executive officer of the Department of the Navy under authority of Section 10 of the Administrative Procedure Act, June 11, 1946, 60 Stat. 243, 5 U.S.C. 1009, and under Sections 305 and 306, Title 11 of the District of Columbia Code (1951 edition), for violation by the defendant of plaintiff's rights under the Fifth and Eighth Amendments to the Constitution of the United States, and for violation of the provisions of Section 9(a) of the Administrative Procedure Act, 5 U.S.C. 1008(a).

2. The plaintiff, a citizen of the United States and a resident of New York, has been and is engaged in the business of manufacturing and

selling uniform caps under the name and style "Ideal Uniform Cap Company." He is the successor in interest in a business which has been conducted over a period of approximately 75 years by his grandfather, father and himself.

3. By letter dated August 10, 1955, the Department of the Navy, by R. H. Fogler, Assistant Secretary of the Navy (Material), advised plaintiff that he had been debarred from receiving Navy Contracts until June 30, 1956, a photostatic copy of this letter being attached hereto as Exhibit I and prayed to be read as part of this complaint. The letter stated that the debarment was effective throughout the Department of Defense.

4. The said letter of debarment set forth two reasons for the action of the Department of the Navy:

2 (a) plaintiff's action in pleading the immunity against self-incrimination granted by the Fifth Amendment before a sub-committee of the United States Senate and in a tax investigation: and

(b) plaintiff's default under Contract N 140-62236s-54294B.

5. The plaintiff promptly protested the action of the Department of the Navy in debarring him to the Comptroller General of the United States, and requested that the debarment be overruled since the grounds cited afforded no basis for the debarment under the Armed Services Procurement Regulations (hereinafter called "ASPR"), and since the Department of the Navy had failed to follow ASPR procedures in debarring him.

6. The Comptroller General of the United States has declined to overrule the action of the Department of the Navy and, inter alia, ruled, in effect, that the procedural defects in the debarment notice could readily be cured by a new notice of debarment, but that requiring the Navy to do so would serve no useful purpose.

7. The allegation in the letter of August 10, 1955, that plaintiff was in default under Contract N 140-62236s-54294B was based on a decision and finding of the Navy's Contracting Officer made on or about July 6, 1955, from which decision the plaintiff had taken a timely appeal

before the Armed Services Board of Contract Appeals, and which appeal was then, on August 10, 1955, pending.

8. On October 31 , 1955, the Armed Services Board of Contract Appeals denied plaintiff's appeal, in the main, and thereafter, on December 20, 1955, denied a request for reconsideration.

9. On April 9, 1956, plaintiff, by his attorney, filed a petition in the United States Court of Claims alleging that the aforesaid termination for default was erroneous, and that the decision and findings of the Contracting Officer were unfair, arbitrary and capricious, and so grossly erroneous as to imply bad faith, and were not supported by the evidence. This action is now pending before the United States Court of Claims. A copy of said petition is attached hereto as Exhibit II.

3 10. Subsequent to the termination of the aforesaid contract for default, the Department of the Navy awarded, on February 17, 1956, Contract No. N 140 (62236) 56657B to the Lumbermens Mutual Casualty Company of Illinois, which was surety for plaintiff on the performance bond on the defaulted contract, calling for the said surety to manufacture and deliver the requirements under the defaulted contract at the same price as in the said defaulted contract.

11. With the approval of the Department of the Navy, Lumbermens Mutual Casualty Company of Illinois subcontracted the performance of all work under its contract to the plaintiff, and plaintiff is now engaged in the performance of that subcontract.

12. Before his appearance before the Senate Subcommittee, and since that time, plaintiff was not and has not been accused of fraud, bribery, tax evasion, perjury or any other crime or moral charge involving the letter or spirit of any Federal statute, executive order or regulation, nor has the plaintiff been charged with contempt as a result of his testimony and actions during the said hearings.

13. The action of the Secretary of the Navy in debarring the plaintiff from Navy contracts and, in effect, all Government contracts, had no basis in fact nor in law, since the question of the plaintiff's

default was then and is now in dispute and under active consideration by an appeal board then, and a Court of competent jurisdiction now. The fact that the plaintiff exercised his Constitutional right under the Fifth Amendment in refusing, on the advice of cousel, to produce his books and records is not a basis for debarment under the pertinent sections of ASPR (Section 1-604).

14. The notice of debarment was procedurally defective since it did not comply with ASPR Section 1-604.3(a), which provides:

> "The notice [of debarment] shall also afford the contractor a reasonable opportunity to present information for consideration in his behalf."

15. The said action of the Secretary of the Navy constituted a "sanction" which was not authorized by law and is in violation of Section 9(a) of the Administrative Procedure Act, 5 U.S.C. 1008(a).

16. The said action of the Secretary of the Navy has deprived the plaintiff of his rights without due process of law, and constitutes cruel and unusual punishment.

4 17. As a result of the said debarment, plaintiff has suffered severe and irreparable damage to his reputation and credit, which has adversely affected his commercial sales and his ability to obtain supplies. As a result, plaintiff has been brought to the brink of financial ruin and will continue to suffer financial hardship unless the debarment is set aside.

18. Plaintiff has, since the debarment, submitted sealed bids on several Government requirements for hats, but has been disqualified, even though in at least one instance he has been the low bidder and acceptance of his bid would have saved the Government a considerable sum of money. There are pending at present Government requirements for uniform caps on which plaintiff is, in effect, debarred from bidding.

19. By reason of the unauthorized and illegal act of the Secretary of the Navy, plaintiff will be debarred from having its bids on these requirements considered by the contracting agencies unless this Court

issies a temporary restraining order and preliminary injunction directing the Secretary of the Navy to terminate the order of debarment.

20. As a practical matter, the plaintiff has thus far been debarred for a period of more than nine and one-half months, and while the debarment will expire in approximately two and one-half months, the plaintiff is entitled to have a declaratory judgment that the debarment was unauthorized, illegal and improper.

21. The termination of the debarment will not per se remove the taint on the plaintiff's reputation and credit, and the aid of this Court is sought in declaring that the debarment was unauthorized and illegal and should be expunged from the records of the Department of the Navy and the Department of Defense.

Wherefore, plaintiff prays:

(1) That the Court issue a temporary restraining order and preliminary injunction directing the defendant to suspend the debarment of the plaintiff forthwith pending the trial of the issues herein.

(2) That, after a trial, the Court grant a declaratory judgment and permanent injunction adjudging and decreeing:

(a) that the plaintiff's Constitutional rights have been infringed by the debarment;

(b) that the action of the Secretary of the Navy in debarring the plaintiff was unauthorized and contrary to law;

(c) that the defendant be ordered to terminate the debarment permanently;

(d) that the defendant take necessary action to expung from the records of the Department of the Navy the debarment resulting from the decision taken in behalf of the Secretary of the Navy dated August 10, 1955.

DIMOND AND THORMAN

/s/ Burton R. Thorman

/s/ Solomon Diamond

Attorneys for Plaintiff

* * *

STATE OF NEW YORK

County of New York , ss:

Sol O. Schlesinger, being first duly sworn on oath deposes and says that he is the plaintiff herein and that the facts set forth in the foregoing complaint are true and correct.

/s/ Sol O. Schlesinger

Subscribed and sworn to before me this 18th day of April, 1956.

/s/ Evelyn Grossman
Notary Public

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6 [Filed April 20, 1956] EXHIBIT I

DEPARTMENT OF THE NAVY
Office of the Secretary
Washington

10 August 1955

Dear Mr. Schlesinger:

The purpose of this letter is to advise you that you have been debarred from receiving Navy contracts until June 30, 1956, and that this debarment is effective throughout the Department of Defense. There are two reasons for this. First, your refusal to answer questions and to make your books and records available to the Investigations Subcommittee of the Permanent Committee on Government Operations of the U.S. Senate has thrown doubt on your right to continue to be eligible for Navy contracts. You have pleaded the Fifth Amendment in connection with an income tax investigation relating to the profits from a business, some 85% of which comes from the Government. At the very least, these facts create doubt as to whether you have paid all the taxes due on the profits which you have received from Government business, and until these doubts are resolved, I cannot, in good conscience, as trustee of the taxpayers' moneys and to prevent their waste, permit further Navy contracts to go to you.

The second ground for your debarment is that you are in default under Contract N140-62236s-54294B.

Sincerely yours,

/s/ R. H. Fogler

Assistant Secretary of the Navy (Material)

Mr. Sol O. Schlesinger
d/b/a Ideal Uniform Cap Co.
30 East Merrick Road
Freeport, New York

---

7 [Filed April 20, 1956] EXHIBIT II

IN THE

UNITED STATES COURT OF CLAIMS

No. 155-56

Sol O. Schlesinger, doing business as Ideal-Uniform Cap Company, Plaintiff,

v.

The United States of America, Defendant.

PETITION

(Filed April 9, 1956)

To the Honorable Court of Claims:

1. The plaintiff, an adult citizen of the United States and of the State of New York, has been and is engaged in the business of manufacturing and selling uniform caps under the name and style "Ideal Uniform Cap Company." The plaintiff is successor in interest in a business which has been conducted over a period of approximately

75 years by his grandfather, father and himself.

2. Under date of February 7, 1955, the defendant, through the Navy Purchasing Office, New York, issued an invitation for fixed price, sealed bids for the furnishing of 50,000 enlisted men's blue service caps, with deliveries to be completed by July 31, 1955. Bidders were
8 required to furnish a proposed monthly delivery schedule.

3. At the bid opening on February 25, 1955, plaintiff was the second lowest bidder. Plaintiff's bid specified that his bid would remain in effect for 20 days. On March 16, 1955, the Contracting Officer requested, and plaintiff agreed to, a seven day extension of the acceptance period. Four successive additional requests for extensions were each granted by the plaintiff, the last such request made on April 12, 1955, leaving the bid in effect until April 23, 1955.

4. After the plaintiff received a telephonic notification that he would be awarded the contract, plaintiff furnished the required performance bond and on May 3, 1955, he received the first written notice that he had been awarded contract N140-62236s-54294B covering the subject requirement.

5. The delivery schedule submitted by plaintiff in his bid offered monthly deliveries at the rate of 15,000 caps commencing April 1955. The formal award received by plaintiff on May 3, 1955, called for monthly deliveries of 15,000 caps commencing May 31, 1955. This revised schedule was determined by defendant without consultation with the plaintiff.

6. The initial shipment of Government property to be furnished for performance of the contract was received by plaintiff late Friday, April 29, 1955, and checked in by plaintiff on Monday, May 2, 1955. This shipment did not contain all materials needed for the manufacture of the caps. A second shipment was received May 5, 1955, and the final shipment on May 26, 1955.

7. Under the terms of the invitation to bid and the award, plaintiff was required to submit for defendant's approval samples of certain component materials and a completed production sample before

9 commencing production. Approvals of component items were made by defendant on June 2, June 15 and June 23, 1955, respectively.

8. By letter dated June 14, 1955, the Contracting Officer advised the plaintiff that deliveries under the contract were delinquent and requested advice as to when deliveries could be expected. On June 23, 1955, plaintiff advised the Contracting Officer that he had been subpoenaed to testify before the Senate Committee on Government Operations and required to produce his records relating to Government contracts. Plaintiff further advised that his reply to the letter of June 14, 1955, had been delayed but that a reply would be forthcoming within a few days. The Contracting Officer told plaintiff "that was perfectly all right."

9. By letter dated June 28, 1955, plaintiff advised the Contracting Officer that all components had been approved, the majority of them prior to the date of the Contracting Officer's letter. Plaintiff also requested a forty-five day extension of delivery dates, due to unanticipated conditions which had arisen as a result of the defendant's delay in accepting plaintiff's bid.

10. On June 29, 1955, a representative of the Inspector of Naval Material, New York, made an inspection of plaintiff's plant and on June 29 or 30, 1955, orally reported to the Contracting Officer that the plaintiff had approximately 19,000 hats in various stages of manufacture and that approximately 3,000 to 4,000 hats were completed and ready for blocking.

11. On the morning of June 30, 1955, the Contracting Officer advised the Navy's Bureau of Supplies and Accounts that he intended to terminate the subject contract for default. At about 12:43 P.M. the same day, the Contracting Officer received the following telegram from the Bureau of Supplies and Accounts:

"Terminate Contract No. N140-62236s-54294B With Ideal Uniform
10 Cap Co. Immediately for Default X Advise When This Action Completed X Keep Busanda Informed of Subsequent Developments."

12. By telegram dated July 1, 1955, the Contracting Officer notified plaintiff that the subject contract was terminated, effective immediately, under the provisions of the default clause of the contract. By letter dated July 6, 1955, the Contracting Officer confirmed his telegram of July 1, 1955, and stated further.

> "The above default action has been taken based upon your inability to meet an acceptable delivery schedule and to perform the contract in accordance with its terms, as indicated in part by your letter of 28 June 1955. Nothing contained in your letter of 28 June 1955 is considered to constitute an excuse for your failure in performance."

No other findings were made by the Contracting Officer.

13. Plaintiff thereupon filed an appeal from the decision of the Contracting Officer. After a hearing, the Armed Services Board of Contract Appeals denied the appeal, but in effect found that plaintiff's failure to make the deliveries due May 31, 1955, was excusable and that plaintiff could only be considered to be in default for failure to make the deliveries due June 30, 1955. A motion for reconsideration was also denied.

14. The defendant's election to terminate the subject contract for default on the morning of the day on which deliveries were required to be made was an unconscionable and inequitable action, particularly since time was not of the essence. The alleged default was not material or substantial. The Contracting Officer had waived the delivery schedule and the default, if any, was excusable under the provisions of the contract. The plaintiff was entitled to a reasonable time in which to make deliveries. The defendant reprocured the subject material from plaintiff's surety and consented to the plaintiff's completing the contract as a subcontractor.

11 15. The decision and the findings of the Contracting Officer alleged to be the basis of the termination were unfair, arbitrary, capricious and so grossly erroneous as to imply bad faith, and are not supported by the evidence.

16. Plaintiff has been damaged by the defendant's breach of the contract in an amount estimated not to exceed $50,000.

17. No other action has been had on said claim in Congress or any other branch or Department of the United States Government, except as set forth hereinbefore; no person other than plaintiff has an interest in this claim, and no assignment or transfer of this claim or any part thereof has been made to anyone; the plaintiff is justly entitled to the amount claimed from the defendant.

WHEREFORE, the plaintiff prays for a judgment against the United States of America in a sum to be determined by the Court together with interest, as provided by law, and for such other relief as may be just and proper, together with the costs of this proceeding.

SOLOMON DIMOND, ESQ.
Attorney for Plaintiff

1011 New Hampshire Avenue, N.W.
Washington 7, D.C.

---

13 [Filed April 20, 1956]

AFFIDAVIT IN SUPPORT OF MOTION FOR RESTRAINING ORDER AND PRELIMINARY INJUNCTION

STATE OF NEW YORK: COUNTY OF NEW YORK, ss:

Sol O. Schlesinger, first being duly sworn, deposes and says:

1. That he is the plaintiff in this cause and that this affidavit is made in support of a motion for a temporary restraining order and preliminary injunction.

2. That prior to the debarment order of the Navy Department dated August 10, 1955, Government contracts constituted approximately 85% of his business, and within the past five or more years all such contracts awarded to your affiant were based on his being the lowest responsible bidder on invitations for sealed bids.

3. That the fact of his having been debarred by the Department of the Navy has been set forth in Dun and Bradstreet reports on your affiant's business with the result that his ability to secure credit has been severely restricted and his business operations have been sharply curtailed to his great financial detriment; that every day that the debarment continues in effect brings your affiant closer to the brink of financial ruin.

4. That on February 17, 1956, your affiant was accepted by the Department of the Navy as a supplier of caps to it as a subcontractor of Lumbermens Mutual Casualty Company, these caps being the same requirement as to which your affiant was alleged to be in default.

5. That since the debarment, your affiant has submitted sealed bids on several Government requirements for caps, but his bids have been disqualified, even though in at least one instance, Invitation #410 of the Army's Philadelphia Quartermaster Depot, (bid opening February 7, 1956) acceptance of his bid would have saved the Government approxi-
14 mately $25,000 in a procurement involving approximately $500,000.

7. That there is pending at present an Army Quartermaster Corps requirement for 28,000 wool serge service caps under its invitation QM 36-030-56-590(351) on which sealed bids are due April 20, 1956, and on which your affiant will file a bid, but that his bid will not be considered because of the debarment.

8. That there is also pending at present a Lackland Air Force Base requirement for 14,400 blue wool serge service and flight caps under bid invitation IFB 41-615-56-78B on which bids are due April 24, 1956, and on which your affiant intends to submit a bid, but that his bid likewise will not be considered because of the debarment.

9. That there are other known military requirements for caps which will probably be procured shortly and from which your affiant is, in effect, debarred from bidding.

10. That your affiant and his father and grandfather have been engaged in the business of making uniform caps for a period of approximately 75 years. As a boy, and later as a youth, your affiant learned

about the business of manufacturing uniform caps. This is a highly specialized business in which no manufacturer could survive if he was precluded from doing business with the U.S. Government. Over the past ten years, your affiant manufactured, sold and delivered approximately $3,000,000 worth of uniform caps to the Department of Defense.

11. That the practical effect of the debarment is driving your affiant out of business and depriving him of a right to make a living in a business which has been his lifelong vocation. Your affiant has been advised by his attorneys that the precipitate and ill-advised action taken by the Secretary of the Navy is contrary to law, equity and public policy.

12. That unless a temporary restraining order is issued by this Court, your affiant will suffer irreparable damage.

13. That your affiant has, and is, endeavoring to maintain his plant in operation, despite continued operating losses, in the hope that he can obtain relief from some source. Relief from the executive branch
15 of the Government having been denied, your affiant prays for the equitable relief which is in the power of this Court to grant him.

/s/ Sol O. Schlesinger

Subscribed and sworn to before me this 18th day of April, 1956.

/s/ Evelyn Grossman
Notary Public in and for the State
and County aforesaid

* * *

ARMED SERVICES BOARD OF CONTRACT APPEALS

Washington 25, D.C.

36 [Filed April 27, 1956] EXHIBIT 1

Appeal of	)	
Sol O. Schlesinger, d/b/a Ideal Uniform Cap Company	)	ASBCA No. 2947
Under Contract N140-62236s-54294B	)	

* * * * * * *

I.

Findings of Fact

1. This is an appeal from a decision of the Contracting Officer to the effect that on 1 July 1955 Appellant was in default on the subject contract and that Appellant's default was not due to causes beyond its control and without its fault or negligence. Appellant in this appeal contends, in effect, that on 1 July 1955 the subject contract was prematurely terminated, that any delay involved in Appellant's performance of the contract arose from causes beyond his control and without his fault or negligence, and that the contract should therefore be deemed to have been terminated for the convenience of the Government pursuant to article 11(e) of the General Provisions of the contract.

2. The subject contract resulted from the Government's acceptance of Appellant's bid submitted in response to an Invitation for Bids issued under date of 7 February 1955.

3. As issued by the Navy Purchasing Office, New York, New York, the Invitation [Standard Form 30, prescribed by General Services Administration, Nov. 1949 edition] called for sealed bids on the furnishing

37 of 50,000 enlisted men's blue service caps in certain specified sizes. The Schedule accompanying the Invitation, on which bids were to be based, described the "Supplies or Services" to be furnished as follows:

"SERVICES (labor and material to cut and manufacture
CAP. SERVICE, BLUE, ENLISTED MEN'S)."

Under the heading of "DELIVERY AND BID PRICES" the Schedule (p. 1) stated:

"The material to be furnished hereunder shall be delivered by the Contractor * * * in the quantities specified below not later than 31 July 1955. * * * the bidder * * * shall insert a firm monthly schedule for the quantity upon which it bid * * *. Deliveries must be completed by 31 July 1955 in the total quantities offered to each destination. Any bid offering an indefinite time of delivery will be rejected."

On page 10 of the Schedule there was included the following provision:

"Performance Bond:

"A performance bond in a penal sum equal to 20% of the amount awarded, or 50% of the total value of the property to be furnished by the Government, whichever is the greater, supported by good and sufficient surety (corporate or individual) satisfactory to the Government, shall be required. Such bond shall be furnished to the Government, at the Contractor's expense, within one week after date of award. The Government may, by written Notice of Default to the Contractor, terminate this contract for failure to furnish such bond as herein provided; and in such event, the Government shall have all the rights and remedies provided under the clause of this contract entitled 'Default.' "

4. On pages 11 and 12 of the Schedule appeared the following statement:

"Preproduction Sample:

"Before commencing production, the contractor shall deliver, all transportation charges paid, to the Clothing Supply Office, 3rd Avenue and 29th Street, Brooklyn 32, N.Y., for approval, a preproduction sample of the materials listed below. Approval of such
38 samples shall be obtained by the contractor in sufficient time to commence production and to make deliveries in accordance with the delivery schedule set forth herein. The contractor is advised that it will require the Clothing Supply Office a maximum of 10 work days after receipt of such samples to determine whether or not they are acceptable. Approval by the Government of the samples

shall not relieve the contractor of its obligation to conform to the specifications and delivery schedule set forth herein. The samples shall be furnished at no cost to the Government whether or not they are found to conform to the specifications. If any of the samples submitted by the contractor do not conform to the specification, they will be rejected and new samples shall be submitted promptly by the contractor, in the same manner as before, for approval by the Clothing Supply Office.

2 samples Cap, Service, Blue, E.M.
1/2 yd. Haircloth
1/2 yd. Cotton Duck
1/2 yd. Wadding
1/2 yd. Polyethylene
1/2 dz. Labels (Garment)
1/4 dz. Bands Sweat, Large
200 yds. 36/3 Cord Thread
200 yds. B/3 Cord Thread
1 Standard Container and Printed Inscription
2 Sheets Tissue Paper
1 lb. Napthalene
1 dz. Staples (if used)
1 dz. Size Tickets (if used)

"Manufacturing Qualifications:

"The manufacture of the garments specified herein requires skill and prior experience in the manufacture of the same or similar garments of a quality equal to or better than the standard Government Sample applicable hereto. Upon request of the Contracting Officer, satisfactory evidence of the nature and extent of experience in this field of manufacture shall be furnished to the Navy Purchasing Office, 3rd Avenue and 29th Street, Brooklyn 32, N.Y. The Government reserves the right to reject the bid of any bidder failing to furnish this evidence promptly when requested, as well as the right to reject, on the basis of inadequate experience,

the bid of any bidder whose factory or factories for the manufacture of the garments, has had less than twelve months' manufacturing experience in quantity production of the same or similar
39 garments of a quality at least equal to the Standard Government Sample, during the three-year period immediately preceding the date fixed for the opening of bids under this Invitation.

"The Government, in its discretion, may further require any bidder, for the purpose of determining its ability to manufacture a garment of satisfactory quality, to submit one or more samples of the garment which it intends to furnish under this Invitation, prior to making any award hereunder. Such sample garments, if required, shall be manufactured at the bidder's expense in the factory or factories which the bidder has indicated in its bid will be the place of performance of any contract awarded hereunder. Requisite materials and patterns may be furnished by the Government to the bidder in the Government's discretion, and if so furnished, shall remain the property of the Government.

"The Government shall have the right to have a representative present during the manufacture of such samples to observe the manufacturing operation. The Government reserves the right to reject the bid of any bidder who fails to submit any requested samples, or whose samples do not conform to the specifications set forth herein. Approval of the samples by the Government shall not relieve the bidder of its obligation to conform to the specifications set forth herein."

5. Concerning the various types of materials which were listed in the Schedule as property which would be furnished by the Government for use in performance of the contract the Schedule provided as follows (p. 15):

"Shipment of Government-Furnished-Property:

"The Government contemplates making shipments of Government-Furnished-Property corresponding to the number of delivery periods

for the end items specified in the clause hereof entitled "Delivery". Each shipment is to be of a size determined by the quantity of end items scheduled for delivery in each such period. Where, however, the size of the award made to the Contractor is too small to warrant dividing the Government-Furnished Property into the number of shipments referred to above, the Government reserves the right, in the interest of economy of shipment, to make fewer and larger shipments. The Contracting Officer may, in his sole discretion, and upon the written request of the Contractor setting forth in detail its reasons for such request, agree to a departure from the Government's planned schedule as set forth above for shipment of the Government-Furnished Property.

"The Government will make the initial shipment of Government Furnished Property within 20 calendar days after the receipt of the performance bond. Shipments of Government-Furnished-Property will normally follow one another at intervals corresponding to the intervals between deliveries of the end items specified in the clause hereof entitled 'Delivery'."

6. On page 17 of the Schedule there appeared the following provision:

"Cutting Reports:

"The Contractor shall submit a weekly Cutting Report, within ten (10) days after the end of the cutting period, to the Clothing Supply Office (Code IVI-1), 3rd Avenue & 29th Street, Brooklyn 32, N.Y., with one copy to the cognizant Inspector of Naval Material. This report shall be submitted on a form entitled 'Garment Cutting Report' to be furnished the Contractor by the Cognizant Inspector of Naval Material and to be accomplished in accordance with instructions issued therewith. The report shall be signed by a responsible official of the Contractor. The Contractor, as a means of notification to the Clothing Supply Office that cutting of the Government-Furnished Property has been completed shall place upon the face of his final cutting report the words 'Final Cutting Report'.

"If no cutting has been performed for a particular week, the Contractor shall submit a cutting report with the notation 'No Cutting'. An individual cutting report shall be submitted for each type of fabric furnished by the Government. The cognizant Inspector of Naval Material will check cutting reports as necessary to insure that Contractors are recording such data properly."

7. Under the terms and conditions of the Invitation to Bid opening of bids received in response to the Invitation was to take place on 25 February 1955. On 24 February 1955 Appellant, Sol O. Schlesinger, an individual doing business as Ideal Uniform Cap Co., located at 30 E. Merrick Road, Freeport, New York, submitted his bid, designating therein the minimum permissible period of 20 days as the period within which the bid was subject to acceptance. Upon the opening of bids, on 25 February 1955, Appellant was found to be the second lowest bidder. Subsequently, on 16
41 March 1955, one day before the expiration of the 20-day acceptance period set forth in Appellant's bid, the Contracting Officer requested an extension. Appellant agreed to an extension of seven days because his plant was idle and his company needed the work very badly. A subsequent extension of the time for acceptance of Appellant's bid was requested and likewise granted, so that the time for acceptance then extended through 31 March 1955. Three more extensions, in turn, were also requested and granted, the last extension providing that Appellant's bid might be accepted on or before 23 April 1955. No money was paid and no promises were made by the Contracting Officer in return for any of the extensions of time granted by Appellant.

8. On 4 April 1955 the Government, after a survey, made a determination that the low bidder was a nonresponsible bidder. On 14 April 1955 a Government buyer, representing the Contracting Officer, telephoned Mr. Schlesinger and notified him that Appellant was awarded contract N140-62236s-54294B, the subject contract. The buyer notified Mr. Schlesinger of the contract number assigned to him, told him that the

award would be dated 14 April 1955, and further told him to furnish to the Navy Purchasing Office, New York, the performance bond which under the terms of the Invitation and Bid (p. 10 of the Schedule) was required to be furnished by Appellant to the Government, at Appellant's expense, within one week after the date of award. The performance bond was obtained by Mr. Schlesinger on 15 April 1955 and was received at the Navy Purchasing Office on 19 April 1955. Formal award of contract N140-62236s-54294B was mailed by the Government on 2 May 1955 and received by Appellant on 3 May 1955.

9. Prior to receipt of the formal award, Mr. Schlesinger has testified, he commenced ordering the components required for performance of the contract. Appellant's order for thread ("50 cones of B/3 cord thread and 200 cones of size 36/3 cord thread") was placed with the American Thread Company on 28 April 1955, as shown by the purchase order for thread which Appellant has introduced in evidence. No other purchase orders have been offered in evidence by Appellant, and the evidence before the Board does not show the dates on which orders were first placed by Appellant for any of the 11 other components which Appellant needed, except that Mr. Schlesinger has testified, on direct examination, that he began to order components before he received the formal notice of award, that he became liable to his suppliers in contract before he received the formal notice of award, that some of the components were ordered before he actually received the notice of award, that "There were other components, however, that were ordered a little later." When asked what other components were ordered later, he stated:

42 "Well, the labels, I couldn't order.

* * *

"There was certain pertinent information that I wanted to be sure wasn't being changed by the contract. There is certain information that appears on the label and the same with the containers * * *."

On cross-examination Mr. Schlesinger's testimony in reference to the same subject matter was as follows:

"Q. Now, I notice in the stipulation that the Navy received eight of your components on the 27th of May 1955. Now, you submitted them all at the same time; is that correct?

"A. Apparently.

"Q. Did you get them all at the same time? "A. They might have been a few days apart.

"Q. And when did you order these various items? "A. At about the same time.

"Q. When was that? "A. Oh, directly after I received the formal contract."

Further testimony of Mr. Schlesinger on this matter, on cross-examination, was as follows:

"Q. Now, do you have available or have -- can you show us when you placed your orders for these other items besides the thread?

"A. No, I don't have it available with me.

"Q. You don't have them in any of the papers that are here?

"A. No, nothing."

10. As stated above, the formal award of the subject contract was received by Appellant on 3 May 1955. The printed award form (Standard Form 26, Prescribed by General Services Administration, Nov. 1949 Edition) contains on the first page thereof the following printed statement:

43 "Your bid on the above numbered Invitation for Bids is hereby accepted as to the items enumerated below with the additions or changes made by you, which additions or changes are set forth in full below."

In his bid Appellant offered a delivery schedule the substance of which was as follows:

Items 1 - 5	April 1955 - 15,000
	May 1955 - 15,000

Destination:	Mechanicsburg, Pa.	June 1955 - 15,000
		July 1955 - 2,696
Item 6		June 1955 - 2,304
Destination:	Clearfield, Utah	

The formal award received by Appellant on 3 May 1955 set forth the following delivery schedule:

Item	Quantity (each)	Time of Delivery (not later than)
1-5	15,000	31 May 1955
	15,000	30 June 1955
	15,000	1 August 1955
	2,696	31 August 1955
6		31 August 1955

Both the Schedule attached to the Invitation for bids, and the formal Award, contained the following statement:

> "The contractor may not accelerate the delivery schedule specified herein without the prior approval of the Contracting Officer."

11. The evidence before the Board clearly establishes the fact that the revision in the delivery schedule which appears in the formal award was made under the supervision of the Contracting Officer by Personnel in his office, rather than being a change made by Appellant, as the printed form statement would indicate. Mr. Schlesinger has testified that he was not advised of this revision in the delivery schedule at the time he received the telephone call from the Government's buyer on 14 April 1955,

44 wherein he was advised that the contract was awarded to his company; also, that prior to his receipt of the formal award on 3 May he had no notice of any change in the delivery schedule; that when he received the formal notice of award and noticed that the date for the first scheduled delivery "had been moved up from the delivery of 15,000 completed items in April to a delivery of 15,000 items in May * * * [he] nonetheless proceeded under the contract"; that, in effect, although he considered it doubtful that he could perform under the new schedule, based on his experience under Government contracts he believed

he could get any necessary adjustment later. The evidence shows that the Contracting Officer, in issuing the award with the revised delivery schedule, considered that the adjustments in delivery times therein set forth adequately offset the delay in accepting Appellant's bid, since the time between the original last day for acceptance of Appellant's bid (17 March 1955) and the day on which was given the telephone notice of the award (14 April 1955) totalled 28 days, and the revised delivery schedule constituted an extension of 31 days in the time for all but one of the scheduled deliveries, and as to that one (item 6) it constituted an extension of 62 days. The Board finds that prior to 28 June 1955 no objection to the revised delivery schedule was made known to the Contracting Officer or his representatives by Appellant.

12. Counsel for both parties have stipulated that one half of the Government furnished property required for full performance of the subject contract was received by Appellant in two shipments, as follows:

> "(a) First shipment was received at the Appellant's plant late on the day of 29 April 1955 (Friday) and checked in by the Appellant on the morning of 2 May 1955 (Monday).
>
> "(b) The second shipment was received late in the afternoon of 4 May 1955 and checked in by the Appellant on the morning of 5 May 1955.
>
> "The remainder of all Government-Furnished Property required in the performance of contract N140-62236s-54294B was received by the Appellant by 26 May 1955."

13. Cutting operations were started by Appellant, Mr. Schlesinger has testified, "somewheres towards the end of May." The fact that no cutting reports were ever submitted by Appellant has been established by stipulation of counsel for both parties. Mr. Schlesinger has testified that the cognizant Inspector of Naval Material never furnished him the forms on which his company was required, under the contract, to submit weekly Cutting Reports within 10 days after the end of the cutting
45 period, and that this was the reason why Appellant furnished no cutting reports at any time. No inquiry was made at any

time by Appellant concerning the availability of the forms on which the Cutting Reports were to be furnished.

14. Counsel for both parties have submitted to the Board the following stipulation as to the submission by Appellant of samples of components which, under the contract, were required to be approved by the Government prior to the commencement of production:

"Pre-production samples of component parts and completed end items (Caps), were submitted by the Appellant for approval by the Clothing Supply Office (Technical Division) as follows:

Item	Date Received By Tech. Div., CSO	Type of Action	Date of Action
Cotton Duck	27 May 1955	Approved	2 June
Wadding	27 May 1955	Approved	2 June
Polyethlylene	27 May 1955	Approved	2 June
Labels	27 May 1955	Approved	2 June
Tissue Paper	27 May 1955	Approved	2 June
Naphthalene	27 May 1955	Approved	2 June
Staples	27 May 1955	Approved	2 June
Haircloth	27 May 1955	Disapproved	2 June
Standard Container	31 May 1955	Approved	2 June
Printed Inscription	31 May 1955	Approved	2 June
36/3C Thread	17 June 1955	Approved	23 June
B/3C Thread	17 June 1955	Approved	23 June
Haircloth	10 June 1955	Approved	15 June
Completed and items (Pre-production Samples - Caps)"	NONE RECEIVED---		------

46 15. Under date of 14 June 1955 the Contracting Officer sent the following letter to Appellant:

"Gentlemen:

"Deliveries under contract N140-62236s-54294B for Services (labor and material to cut and manufacture Caps, service, blue enlisted men's) are delinquent.

"Records indicate that satisfactory pre-production samples and components have not yet been approved although the contract award date was 14 April 1955.

"Your failure to submit satisfactory pre-production samples and components, plus your failure to deliver the first quantity of 15,000 caps not later than 31 May 1955 is endangering the performance of the contract. In this connection, your attention is invited to the underlined sentence of paragraph entitled 'Pre-production Sample' quoted as follows: 'Approval by the Government of the samples shall not relieve the contractor of its obligation to conform to specifications and delivery schedules set forth herein.'

"This letter notice is your first warning concerning delinquency in deliveries of Caps, services, under subject contract. You are requested to immediately advise the Contracting Officer the specific dates on which deliveries can be expected. Upon receipt of the information further determination will be made regarding the status of your contract.

Sincerely yours."

16. Mr. Schlesinger has testified that at about the time he received the above quoted letter he was engaged in locating numerous records which were desired by various investigators of a Senate Committee, that he appeared before the subcommittee on 21 June 1955, in Washington, in executive session, and that on 23 June 1955 he appeared before the subcommittee in public session; that on the morning of 23 June 1955 he met the Contracting Officer on the plane en route to Washington; that at that time he told the Contracting Officer he had been busy in connection with the activities of the subcommittee but that he would reply to the Contracting Officer's letter within the next few days, and that the Contracting Officer told him "that was perfectly all right." The Contracting Officer's

testimony regarding this meeting was to the effect that Mr. Schlesinger asked him if he was going to Washington for his [Mr. Schlesinger's] benefit; that Mr. Schlesinger explained the question by stating that he had been called to Washington to appear before the Committee on Government
47 Operations" on some charges, or alleged charges, surrounding Government contracts"; that the witness didn't "recall anything on the specific contract."

17. Under date of 28 June 1955 Mr. Schlesinger addressed the following letter to the Contracting Officer:

"Dear Sir:

"We have your letter of June 14th referring to deliveries on the above numbered contract for the manufacture of Caps, Service, Blue, Enlisted Mens.

"All components that we are to furnish have been approved, the majority of them prior to the date of your letter. Completed end items will be coming through production within the next few days, at which time two samples will be rushed to your office for inspection. As we have successfully made hundreds of thousands of these identical caps for the Navy in the past, we feel certain that our samples will meet with your approval.

"We respectfully request a forty-five day extension of the delivery dates as conditions have arisen, due to the many extensions we have made of the acceptance date of the bid, that necessitate this request. We were forced to pay more for components than we were originally quoted because of the delay, but do not propose to claim this additional cost. We feel that an insufficient adjustment was allowed in time when the delivery dates were written into the contract. We did not make this request sooner as we were attempting to meet the original delivery date, but current conditions rendered it impossible.

"Thank you kindly for this and past courtesies.

Very truly yours."

The above quoted letter was endorsed by the Contracting Officer as having been received at 1400 (2:00 p. m.) on 30 June 1955. Prior to receipt of Appellant's letter the Contracting Officer, on 27 June 1955, had talked on the telephone with a lieutenant commander in Washington who was Assistant to the Assistant Chief of the Bureau of Supplies and Accounts for Purchasing. The lieutenant commander inquired as to the status of the subject contract with regard to Appellant's reply to the Contracting Officer's letter of 14 June 1955 which has been quoted above, also as to whether preproduction samples had been approved. He advised the Contracting Officer that Senator McClellan had sent a letter
48 to the Navy Department asking as to the status of the contract and implying that the contract should be cancelled. He asked the Contracting Officer to find out how badly the Clothing Supply Office needed the caps (which were subject matter of the contract), and advised that if there was not an urgent need for the caps it was intended that the Contracting Officer should terminate the contract for default. Upon inquiry the Contracting Officer ascertained that the caps were for reserve stock and were not urgently required; he also learned that preproduction components had been approved but that preproduction sample caps had not yet been received for approval. The Contracting Officer immediately called the lieutenant Commander back on the telephone and advised him of what the Contracting Officer had learned. In turn, the Contracting Officer was told that the captain who was the Assistant Chief of the Bureau of Supplies and Accounts for Purchasing advised that the Contracting Officer should check with legal counsel, consider all the facts, and find out whether the contract could legally be terminated for default at that time.

18. On 29 June a representative of the Inspector of Naval Material, New York, made an inspection at Appellant's plant in reference to the status of the subject contract, and in reference to the Government-furnished material which had been supplied to Appellant under the contract. On either the 29th or the 30th of June a report of the results of the inspection was given orally on the telephone to the Contracting Officer. The report showed the following:

(a) Approximately 1,000 yards of uncut blue Melton cloth.

(b) 30-40% Government Furnished Property in the cutting process.

(c) Approximately 19,000 hats in various stages of manufacture.

(d) Approximately 3,000 to 4,000 hats completed and ready for blocking.

19. On 30 June, before Appellant's letter of 28 June 1955 had been received by the Contracting Officer, he (the Contracting Officer) advised the Bureau of Supplies and Accounts that he intended to terminate the contract for default. At about 12:43 p.m. on that day he received the following telegram from the Bureau of Supplies and Accounts:

"TERMINATE CONTRACT NO N140-62236S-54294B WITH IDEAL UNIFORM CAP CO IMMEDIATELY FOR DEFAULT X ADVISE WHEN THIS ACTION COMPLETED X KEEP BUSANDA INFORMED OF SUBSEQUENT DEVELOPMENTS."

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At about 4:25 p.m. on 1 July 1955 the following telegram, originated by the Contracting Officer, was given to Western Union by the Navy Purchasing Office, New York:

"012025Z ACTION IDEAL UNIFORM CAP CO ATTN MR SOL O SCHLESINGER FREEPORT LI NY. INFO AMERICAN LUMBERMENS MUTUAL CASUALTY CORP OF ILLINOIS NYK. INSPECTOR OF NAVAL MATERIAL NYK. NAVAL REGIONAL ACCOUNTS OFFICE GENERAL COUNCIL NYK. CLOTHING SUPPLY OFFICE CODES IV-O AND IC-O BKLYN NY. - YOUR CONTRACT NO N140-62236S-54294B FOR CAPS CMM BLUE CMM ENLISTED MENS IS HEREBY TERMINATED IN ITS ENTIRETY PURSUANT TO CLAUSE ENTITLED DEFAULT OF THE CONTRACT EFFECTIVE IMMEDIATELY X LETTER AND INSTRUCTIONS FOR DISPOSITION OF ALL GOVERNMENT FURNISHED PROPERTY WILL FOLLOW.

NAVY PURCHASING OFFICE NEW YORK."

The evidence before the Board shows that the above quoted telegram probably arrived at Appellant's office on Saturday, the 2nd of July, and that Mr. Schlesinger first saw it when he came in his office on Tuesday morning,

the 5th of July, 1955. On the same day (5 July 1955) Mr. Schlesinger, together with his attorney, called in person on the Contracting Officer at the Navy Purchasing Office in New York City. On 6 July 1955 the Contracting Officer sent the following letter to Appellant:

"Dear Sir:

"This will confirm our telegram of 1 July 1955, which read as follows:

"'YOUR CONTRACT NO. N140-62236s-54294B FOR CAPS CMM BLUE CMM ENLISTED MEN'S IS HEREBY TERMINATED IN ITS ENTIRETY PURSUANT TO CLAUSE ENTITLED DEFAULT OF THE CONTRACT EFFECTIVE IMMEDIATELY X LETTER AND INSTRUCTIONS FOR DISPOSITION OF ALL GOVERNMENT FURNISHED PROPERTY WILL FOLLOW'"

"The above default action has been taken based upon your inability to meet an acceptable delivery schedule and to perform the contract in accordance with its terms, as indicated in part by your letter of 28 June 1955. Nothing contained in your letter of 28 June 1955 is considered to constitute an excuse for your failure in performance.

"Pursuant to paragraph (h) of Clause 'A', Government Furnished Property, attached to your contract, you are requested to submit, within two (2) weeks from receipt of this letter, inventory schedules, certified by you to be accurate, covering all items of property, by type, size and quantity, received by you from the
50 Government. This inventory should include scrap and work in process, as well as unused cloth and other items. You are further directed to make disposition of the Government's property in accordance with instructions which will be furnished you by the cognizant Inspector of Naval Material.

"You are further advised that, in addition to its other rights and remedies, and as provided in the aforementioned clause entitled 'DEFAULT', the Government may procure, upon such terms and

in such manner as the Contracting Officer may deem appropriate, supplies or services similar to those herein terminated, and you shall be liable to the Government for any excess costs for such similar supplies or services.

"The telegram of 1 July 1955, as confirmed by this letter, constitutes a decision of the Contracting Officer made pursuant to the clause of the contract entitled 'Disputes.'

Very truly yours."

20. Under date of 28 July 1955 Appellant appealed to the Secretary of the Navy from the above quoted telegram of termination and from the confirming letter of 6 July 1955.

21. Further findings of fact are as they appear in the paragraph below.

DECISION

22. Included among the arguments presented by the Government, in resisting the appeal, is a contention to the effect that the Contracting Officer's letter of 14 June 1955 constituted an effective notice, pursuant to article 11 (a) (ii) of the General Provisions of the subject contract,*

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* Article 11(a) of the General Provisions of the subject contract reads as follows:

"(a) The Government may, subject to the provisions of paragraph (b) below, by written Notice of Default to the Contractor terminate the whole or any part of this contract in any one of the following circumstances:

"(i) if the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or

"(ii) if the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure."

that Appellant was so failing to make progress as to endanger performance
51 of the contract in accordance with its terms, and that the telegraphic notice of termination for default issued on 1 July 1955, confirmed by letter of 6 July 1955, constituted a valid termination of the contract for such continued failure.

23. In the opinion of the Board this contention cannot prevail. The Board finds and rules that the letter of 14 June 1955, under all the circumstances here shown, did not constitute an adequate notice (of failure to make progress) within the meaning of the word "notice" as used in article 11 (a) (ii) of the General Provisions of the contract. The notice starts out satisfactorily enough. The first paragraph states deliveries are delinquent. The second paragraph specifies that the necessary preproduction samples and components have not yet been approved. The third paragraph states that Appellant's failure to submit satisfactory preproduction samples and components, plus his failure to deliver the first quantity of 15,000 caps by 31 May 1955, is endangering performance of the contract. Standing by themselves, these three paragraphs might have constituted a proper notice, although it would appear that a more satisfactory notice would have been achieved if there had been included an express statement to the effect that the contract would be subject to termination for default if the specified failure was not cured within 10 days of the contractor's receipt of the notice. However that may be, the fact remains that in the instant case the notice upon which the Government depends contained the following additional paragraph:

> "This letter notice is your first warning concerning delinquency in deliveries of Caps, service, under the subject contract. You are requested to immediately advise the Con-
52 tracting Officer the specific dates on which deliveries can be expected. Upon receipt of the information further determination will be made regarding the status of your contract."

Not only, therefore, does the notice here in issue not contain any express statement to the effect that the contract will be subject to

termination for default if the failure to make progress is not cured within 10 days, but also, as if in lieu thereof, the notice characterizes itself as being a "first warning," as though there would be, if necessary, a second notice or warning. In addition, the next sentence of the fourth paragraph calls for information as to the dates on which deliveries can be expected -- information, it would appear, which might be more consistent with consideration of the question as to whether the contract should be terminated for default for failure to make delivery, rather than with consideration of a question as to whether the contract should be terminated under the failure to make progress clause. The Board is not persuaded that the letter of 14 June 1955, reasonably read as a whole, constituted adequate notice to Appellant within the meaning of article 11(a) (ii). We hold, therefore, that the termination of the contract is not to be justified as constituting valid action taken pursuant to the provisions of article 11(a) (ii) of the contract, since other than the letter of 14 June 1955 no notice of failure to make progress was given to Appellant at any time prior to the termination of the contract.

24. On this view of the matter there is left, therefore, the question as to whether the termination of the subject contract on 1 July 1955 was justified by virtue of any failure on the part of Appellant to make delivery of supplies within the meaning of article 11(a)(i) of the contract. Article 11(a) provides that subject to the provisions of paragraph (b) thereof the Government may, by written notice of default to the contractor, terminate the whole or any part of the contract in the following circumstance:

> "(i) if the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof * * *."

25. Under the terms of Appellant's bid, which was in response to and consistent with the provision of the Invitation, the first 15,000 caps were to be delivered in April, an additional 15,000 in May, 17,304 more in June, and 2,696 in July. Actual delay was caused Appellant by the

Government's delay in accepting Appellant's bid. There can be no dispute on the evidence but that the period from 17 March to 14 April was a period of actual delay, totaling 28 calendar days. Was there any actual delay encountered thereafter by Appellant due to the Government's delay in acceptance of Appellant's bid?

53 26. On the evidence the Board finds that after receipt of the telephone notice of award on 14 April 1955 Appellant was not any longer delayed in commencing performance of the contract work by virtue of the delay of the Government in issuing the formal notice of award, except as to the placing of Appellant's orders for labels and containers.* As concerns appellant's order for thread, which was placed on 28 April 1955, two weeks after the telephone notice of award, Mr. Schlesinger has testified, in effect, that the two weeks interval between 14 April and 28 April 1955 was a delay necessarily encountered in the process of ascertaining, at that time, which supplier could then offer the shortest delivery time. In view of the fact, however, that he has also testified that in his business he usually obtains his estimates on the telephone, and that the sources for thread that he considered reliable were three or four in number, the Board finds no reason has been shown as to why

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* Mr. Schlesinger has testified that he withheld placing his order for labels until after receipt of the formal notice of award, that there was certain information that he wanted to be sure wasn't being changed by the contract, that there was "certain information that appears on the label, and the same with the containers," and counsel for both parties have stipulated that the labels were received by the Clothing Supply Office for approval on 27 May 1955, and the containers on 31 May 1955, and that both materials were approved on 2 June 1955. There is no evidence before the Board, however, as to how soon after receipt of the formal notice of award Appellant placed its orders for these two materials, nor any evidence as to when these materials were in fact first received by Appellant. Appellant, in other words, has failed to show that Appellant in the exercise of due diligence could not have obtained them in time for use in a shipment of the first 15,000 caps on or before 31 May 1955, and regardless of any delays encountered they obviously were available for use in a shipment in June, if such a shipment had been made. Any delay encountered by Appellant in placing its orders for labels and containers, therefore, was not the cause for Appellant's failure to deliver 15,000 caps in June 1955. See paragraph 32, below.

Appellant, if he had been diligent, could not have placed his order for thread at least 10 days earlier than the date of its actual order, which was 28 April 1955. Appellant has not offered any evidence as to any reason why Appellant could not have placed its orders for all the other required materials promptly after receipt of the telephone notice of award. In brief, on all the evidence the Board finds that Appellant considered 14 April 1955 as the date on which it should commence its work under the contract, and that in fact any delay beyond that date in the commencement of work by Appellant under the contract, with the exception of placing its orders for labels and containers, was not due
54 to the fact that only a telephone notice of award had as yet been made.

27. In addition to the actual delay encountered by Appellant from 17 March 1955 to 14 April 1955 in its commencement of work under the contract was there any other actual delay encountered in its performance of the contract work which is shown by the evidence to have been due to the delay in receipt by Appellant of notice of the award of the contract?

28. On behalf of Appellant it has been argued to the effect that, in general, in Appellant's business periods of time required for deliveries of materials on orders placed in March are shorter than the delivery times on orders placed in April or May, due to seasonal variations in the industry. Although testimony offered on behalf of Appellant tends to indicate that in general such is the case in the textile manufacturing industry, the evidence before the Board is of little aid in establishing the amount of any actual increases in delivery times that were in fact encountered by Appellant in obtaining any of the 11 components, other than thread, which Appellant has listed as required for the performance of the subject contract. No more concrete statement has been offered, in reference to this matter, than is found in Mr. Schlesinger's statement to the effect that in contacting some of his suppliers, before granting some of the extensions of time for acceptance by the Government of

Appellant's bid, he found suppliers were adding "reasonable additions [of delivery time] to the original order"; that "In other words, if they were quoting a month in February, they were now quoting six weeks, which is to be expected at that time. There was nothing abnormal about it." It is true that Mr. Schlesinger's testimony, in effect, indicates that he considers that whatever period of time Appellant was late in its performance under the contract was time due, or apparently due, to such seasonal increases in delivery times on its orders for component materials. At the same time, however, he has testified that his original bid was based on the expectation that award of the contract would be made by approximately the first week of March (although by the terms of his offer the Government had until 17 March to accept the offer) -- that he assumed that he would get the award in about a week (from the date of his bid - 24 February). On his own testimony it appears that the delivery times offered in his bid were, as computed by him on the basis of the estimated delivery times he had obtained from his prospective suppliers, about two weeks shorter than the periods of time which he would need for performance if his offer were accepted on the last day of the acceptance period which his offer specified. On all the evidence the Board finds as a fact that in formulating his bid for the subject contract Appellant set himself a schedule for the delivery of the first 15,000 caps called for under the contract which Appellant himself did not expect to be able to meet if the award was not received in the early part of the 20-day
55 acceptance period, and which in fact he could not have met except by the exercise of greater diligence than he displayed in his actual performance under the subject contract, and at greater labor cost than he in fact, as the evidence shows, was willing to incur in his performance of the contract. Under these circumstances it is apparent that any delays by Appellant in meeting delivery schedules cannot automatically be attributed in their entirety to seasonal increase in supplier's delivery times, nor does the evidence show what portions of delays should be so attributed.

29. Appellant, it appears, has relied largely upon the fact, stipulated by counsel, that one type of thread that was required was not received by Appellant until 14 June 1955. As noted above, however, Appellant has not satisfactorily explained why the thread was not ordered within a day or two, or possibly three or four, after 14 April 1955, rather than on 28 April 1955, the date on which it was in fact ordered. Mr. Schlesinger has testified that as he recalled it the same supplier, when originally asked by Appellant for its estimated delivery time for purposes of enabling Appellant to compute its bid, had guaranteed delivery "under a month." By way of further explanation of this testimony, apparently, Appellant's counsel asked Mr. Schlesinger the following question:

> "Q. So that if you had placed an order during the first week of March you would have had the shipment during the first week of April? A. That is right."

The actual maximum delivery period for the thread, therefore --28 April to 9 June for one type of thread, 28 April to 14 June for the other type of thread -- was at best only about 16-17 days in excess of what Mr. Schlesinger recalled as being the estimated delivery time upon which he had relied in formulating Appellant's bid. It may be noted that if Appellant's bid had been accepted on the final day of the original 20 acceptance period, namely, on 17 March 1955, delivery of the thread on the basis of a one-month delivery period would not have been effected until about 16 April or later (depending upon the length of time required for placing the order after receiving notice of the award), or 14 calendar days or less before the final allowable date for delivery of the initial 15,000 caps according to the delivery schedule offered by Appellant in his bid, i.e., 15,000 during April. Even if the evidence showed -- and in the opinion of the Board it does not -- that all that portion of the period from 14 April to 14 June (i.e., from the date of the telephone notice of award to the date of receipt of the second type of thread) which was in excess of the original estimated delivery period of one month constituted delay beyond the control and without the fault or negligence of Appellant,

56 there nevertheless remained in the month of June, subsequent to Appellant's receipt of the thread, as much time, or more, for delivery of 15,000 caps in June as would have remained in the month of April for delivery of 15,000 caps in April if Appellant's bid had been accepted on 17 March, the last day for acceptance under the terms of Appellant's offer prior to any extension thereof.

30. Under the circumstances here shown the Board finds that any delay in obtaining thread which was encountered by Appellant and which was beyond Appellant's control and without its fault or negligence -- exclusive of the period from 17 March to 14 April, during which notice of award was being delayed -- constituted a delay of less than one month over and beyond the delivery time which Appellant actually expected to encounter in obtaining thread at the time it prepared and submitted its bid. Any other delay which Appellant encountered and as to which there is any evidence at all was concurrent with, and of less extent than, the delay which Appellant contends it encountered in reference to the thread. The maximum total delay actually encountered by Appellant, therefore, in its performance of the contract work (after commencement of work), from causes beyond its control and without its fault or negligence, was a delay of less than one month, and the Board so finds.

31. What, then, was the legal status of Appellant's contract on 1 July 1955, the date on which the Government initiated its notice of termination of the contract for default? Under the terms of Appellant's bid 15,000 caps were offered for delivery in April as the first installment under the proposed contract. That proposal, as a part of appellant's entire bid proposal, was accepted by the Government by a late notice of award, the lateness of which was waived by Appellant. In Appeal of Nantex Manufacturing Co., Inc., ASBCA No. 300, decided 31 May 1950, the Board stated:

> "* * * the statutory requirements of Government procurement result in a change in the implications to be drawn from certain types of conduct in the field of offer and acceptance of contracts. The

contractor and unsuccessful bidders on the same procurement are entitled to the protection of the Statute as well as the Government. Therefore, when a bid is submitted requiring acceptance by a certain date, lateness in the award, if accepted by the contractor, does not constitute a counteroffer and acceptance as it might in the field of private contracts, but is deemed by the above cited
57 authorities* merely to constitute a waiver by the contractor of its right to refuse the proffered contract. Once this situation is understood, it seems to follow as a matter of course that the respective rights and obligations under the formalized contract relate back to the time of the submission of the bid, at least for the purpose of considering questions arising under the liquidated damages clause of the contract."

Under the circumstances here shown by the evidence, including the particular contract provisions which are here involved, the Board finds and rules that the parties did not, in entering into the subject contract, so waive or abandon a fixed delivery schedule as to cause the contractor's obligation of performance to become by operation of law an obligation to complete the work within a reasonable time. The Board holds, instead, that in the instant case the rights of the parties are to be determined by referring to the delivery schedule which the Contracting Officer submitted to Appellant at the time of the late award and which Appellant without protest undertook to meet. That delivery schedule, as has been seen, extended the delivery periods offered in Appellant's bid by the number of days of actual delay encountered by Appellant in the commencement of the contract work due to the late notice of award, plus three additional days as to Items 1-5, and by 34 additional days as to Item 6. In the opinion of the Board this revised delivery schedule, derived by

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* Griffiths v. United States, 77 C. Cls. 542; Samuels, et al., Exrs., BCA No. 1147, 4 CCF, para. 60, 703 (decided 30 June 1949); Big State Garment Company, ASBCA Nos. 337 and 338. See also, in this connection, Jacob Schlesinger, Inc. v. United States, 94 C. Cls. 289, at 306-309, a case wherein the plaintiff was found to have improvidently agreed, in its contract, to complete it in a time that was too short (p. 309); Lebanon Woolen Mills, Inc. v. United States, 99 C. Cls. 318.

adding what the Board finds to be reasonable amounts of time to the delivery times proposed by Appellant in its bid, likewise constitutes, in the eyes of the law, constructively, a reasonable schedule for Appellant's performance of the work upon which it bid. We say "constructively" because of the fact that Appellant in his bid proposed what in all likelihood were improvident delivery times, a fact which is not, in the opinion of the Board, altered to Appellant's benefit by the late acceptance which Appellant allowed the Government to effect. In the opinion of the Board Appellant, by his conduct, concurred in the revision of the delivery schedule which the Contracting Officer, at the time of accepting Appellant's bid, impliedly proposed as constituting a reasonable extension of time under the circumstances. Not only did Appellant by his conduct manifest concurrence, but also the revised delivery schedule in fact
58 constituted, as the Board here finds, a new reasonable delivery schedule under all the circumstances here shown. The revised delivery schedule itself, of course, is subject to the operation of all other pertinent contract clauses. In particular, reference is intended to the provisions of article 11(b) and 11(e) of the General Provisions concerning Appellant's rights in the event any failure on its part to perform the contract is found to have been beyond its control and without its fault or negligence.

32. Under the revised delivery schedule a delivery of 15,000 caps in May 1955 was required. Appellant failed to make such a delivery. On 1 June 1955, therefore, the Government was entitled to terminate the contract pursuant to the provisions of article 11 of the General Provisions of the contract entitled "Default," even though, as the Board here finds, Appellant's failure to deliver on or before 31 May 1955 was a failure beyond its control and without its fault or negligence. Instead of terminating the contract for default -- that is, for the nondelivery by Appellant of 15,000 caps in May -- the Contracting Officer, in the opinion of the Board, waived Appellant's failure to make the delivery required in May and, instead, issued the warning letter of 14 June 1955. Thereafter, any valid termination of the contract for default would have to be

based on some new default, not the default in May. In the opinion of the Board the only delivery which the Government had as yet waived, by its conduct and the Contracting Officer's letter of 14 June 1955, was the May delivery which was already in default; the Board does not consider that the letter of 14 June is reasonably to be read as constituting a waiver, in advance, of any future deliveries which were still required under the terms of the revised delivery schedule. When, therefore, Appellant failed to deliver 15,000 caps in June, he was in fresh default, and on 1 July 1955 the Government again was possessed under the contract of the right to terminate the contract for default. By his telegram of 1 July 1955 the Contracting Officer exercised that right of termination. It should be noted that the actual termination of the contract was effected by that telegram, not by the later confirming letter of 6 July 1955. (In the case of Cowan Co., ASBCA Nos. 2373, 2374, the Board has previously had occasion to hold that termination was in fact effected by a telegram, rather than by a later confirming letter.)

33. On the facts above found by the Board we hold that Appellant's failure to deliver the 15,000 caps required to be delivered in June was not a failure beyond his control and without his fault or negligence. As has been stated above, in paragraph 29, there remained in the month of June, subsequent to Appellant's receipt of the thread, as much time, or more, for delivery of 15,000 caps in June, as would have remained in the month of April for delivery of 15,000 caps in April if Appellant's
59 bid had been accepted on 17 April 1955 without any lateness of award and without any delay in receipt of thread or other materials resulting therefrom. In the opinion of the Board, therefore, the appeal must be denied, and it is so ordered.

II.

34. Under date of 30 August 1955 the following letter was sent to Appellant by the Contracting Officer:

"Dear Sir:

"Reference is made to your letter of 27 July 1955 in which you request 'an equitable adjustment in the price of items' to be

furnished under the subject contract.

"In view of the fact that no deliveries have been made by you under the subject contract, and inasmuch as your right to make future deliveries has been terminated for your default, it is difficult to understand to which items you refer in your request for an adjustment in price.

"If your request is to be interpreted as a claim for unliquidated damages for breach of contract resulting from the Government's alleged delay in furnishing you with the Government Furnished Property as provided in the subject contract then your claim is clearly beyond the jurisdiction of the Contracting Officer, as well as the Board of Contract Appeals, and therefore cannot be entertained by this office.

"This office would appreciate any further clarification of your claim which you may care to submit.

Very truly yours"

35. Under date of 12 September 1955 Appellant addressed a letter to the Secretary of the Navy, stating that the Contracting Officer, by the above quoted letter, had rejected as a request for "unliquidated damages" Appellant's claim for "an equitable adjustment in the price of items" (to be furnished under the subject contract) due to alleged delay by the Government in the delivery of Government-furnished property, and advising that therefore Appellant was appealing from that ruling.

36. By agreement of counsel for both parties the issues raised by Appellant's letter of 12 September 1955, as a notice of appeal, were
60 included for hearing and disposition under the docket number ASBCA No. 2947, already assigned to Appellant's earlier notice of appeal which is the subject of the above decision.

37. In the opinion of the Board this portion of the consolidated appeal must be dismissed as premature. The letter from which Appellant has appealed does not constitute a decision. It even concludes with an

invitation for Appellant to clarify its claim. This portion of the consolidated appeal is therefore dismissed as premature.

Dated: 31 October 1955.

/s/ Robert H. Sproul, Chairman of
the Navy Contract Appeals Panel
and Member of Division No. 1

I concur
/s/ Seward H. Bowers
Member of Division No. 1,
Navy Contract Appeals Panel

I concur
/s/Herbert D. Taylor,
Member of Division No. 1,
Navy Contract Appeals Panel

* * * * * * *

ARMED SERVICES BOARD OF CONTRACT APPEALS

Washington 25, D.C.

61 [Filed April 27, 1956] EXHIBIT 2

Appeal of

Sol O. Schlesinger, d/b/a Ideal Uniform Cap Company) ASBCA No. 2947

Under Contract N140-62236s-54294B)

* * * * * * *

ON APPELLANT'S MOTION FOR RECONSIDERATION

1. Subsequent to the rendering of the decision of the Board in the above entitled matter, dated 31 October 1955, Appellant filed a timely motion for reconsideration.

2. The substance of the motion is well indicated by the following statements which Appellant's counsel made in the letter wherein the motion was forwarded to the Board for filing:

"This is a motion by the Appellant under Rule 29 of the Rules of the Armed Services Board of Contract Appeals for reconsideration by the Board of its Decision in the above-captioned case handed down on 31 October 1955.

"This motion is addressed to the findings and decisions contained in paragraphs 32 and 33 of the Decision of 31 October 1955.

"By way of summary to the point of the motion, the Board found that termination of the contract was not justified on 1 July by virtue of Article 11(a)(ii) of the contract, since no adequate prior notice was given as required therein (Decision, par. 23). The
62 major remaining point left to determine was whether termination was effected under Article 11(a)(i), and this the Board answers affirmatively in paragraphs 32 and 33.

"In reaching their conclusions in the said paragraphs 32 and 33, the Board either overlooked or was mistaken in:

1. Making no findings of fact that the telegram of 1 July and the letter of 6 July were in fact applicable only to Article 11(a)(ii).

2. Making no findings of fact that there was no affirmative action on the part of the Government to terminate the contract under Article 11(a)(i).

3. Making no findings of fact that the Government having failed to terminate the contract by its actions on 1 July and 6 July as they applied to Article 11(a)(i), and not being justified in their attempt to so do under (a)(ii) of the said article, the Government in effect did forbear from insistence on deliveries as specified in the contract.

4. Rendering its decision without taking cognizance of the overlooked findings."

3. At the request of Appellant's counsel the case was assigned for oral argument on the motion before the full Board. The presentation of oral argument, by counsel for both parties, took place on 21 November 1955.

DECISION

4. Counsel for Appellant has argued that although the Board, in its decision, found that on 1 July 1955 the Government was legally entitled to terminate the contract for default pursuant to the provisions of article 11(a)(i) [i.e., for Appellant's failure to make timely delivery] the

Board did not find that the Contracting Officer exercised that right. Appellant's counsel has further argued that the only valid finding in this respect which could properly be reached by the Board, on the record before it, would be a finding to the effect that the Contracting Officer did not in fact exercise that right, and that Appellant is entitled to have that finding made. Appellant's counsel has contended that this result is required by virtue of the fact that the default article (article 11 of the General Provisions of the contract) is a provision in the nature of a

63 forfeiture provision, and that as a matter of law the party seeking to obtain the benefit of the application of such a provision must be held to strict observance of such a clause. A "Written Notice of Default" which specifies that the circumstance under which the contract is being terminated is the contractor's failure so to make progress as to endanger performance of the contract in accordance with its terms [one of the circumstances listed in article 11(a)(ii)] would not, according to the argument of Appellant's counsel, constitute a sufficient "Written Notice of Default" representing the necessary strict observance of the provisions of article 11(a), if, in fact, the only valid existing circumstance which would justify termination of the contract for default at that time was that the contractor had failed to make timely delivery of supplies [one of the circumstances listed in article 11(a)(i)]. Consistent with this argument, Appellant's counsel has contended, it appears, that in order to be a proper Written Notice of Default, the notice which is given must specify either that the circumstance which the Government considers as constituting the default for which the contract is being terminated is one of the circumstances specified in article 11(a)(i), or that it is one of the circumstances specified in article 11(a)(ii). In the instant case, counsel for Appellant has in effect argued, the telegraphic notice of termination for default and the confirming letter necessarily must be read together, in order to find a Written Notice of Default complying with the standards which he insists upon, and reading them thus together counsel for Appellant would have the Board conclude that the Written Notice of Default which is found is a notice that specifies only a circumstance specified

in article 11(a)(ii), and that, therefore, in view of the Board's finding that the prior 10-day notice required under article 11(a)(ii) had not been given, the purported termination for default was invalid and must be held (under article 11(e)) to have been a termination for the convenience of the Government. The silence which Appellant's counsel finds in the telegram and the letter, read together, as to any specification of a failure to make timely delivery (under 11(a)(i)) constitutes, in the opinion of Appellant's counsel, a definitive waiver of the Government's right to terminate which existed, the Board has found, by virtue of Appellant's failure to make delivery of 15,000 caps in June 1955.

5. In the opinion of the Board the telegram of 1 July 1955, and the letter of 6 July 1955, do not read as Appellant's counsel would have us read them. In the first place, we are of the opinion that the telegram in and of itself constituted the Written Notice of Default which the Government, under the provisions of article 11(a), was entitled to issue by virtue of Appellant's failure to delivery 15,000 caps in June 1955. The fact

64 of that failure, and the question as to whether that failure was considered by the Contracting Officer as being due to causes beyond the control and without the fault or negligence of Appellant, are two distinct and separate matters. The act of termination of the contract was effected by the telegram, which stated that the termination was being effected "Pursuant to Clause Entitled Default." The act of termination, that is, the telegram, did not purport to constitute a decision as to excusability or non-excusability of the causes of Appellant's default. That decision was communicated in the letter of 6 July 1955, a decision to the effect that Appellant's default was not deemed to be due to excusable causes. As is here indicated, the Board is of the opinion that the telegraphic notice of termination for default, which did not specify as to whether the circumstance or circumstances constituting the default were circumstances of the 11(a)(i) type or of the 11(a)(ii) type but which did unmistakably advise Appellant that the contract was terminated for default, constituted an adequate Written Notice of Default within the meaning of that term as used in article 11(a) of the General Provisions of the contract. As the

Board stated in its decision (page 23),

> "When, therefore, Appellant failed to deliver 15,000 caps in June, he was in fresh default, and on 1 July 1955 the Government again was possessed under the contract of the right to terminate the contract for default. By his telegram of 1 July 1955 the Contracting Officer exercised that right of termination. It should be noted that the actual termination of the contract was effected by that telegram, not by the later confirming letter of 6 July 1955."

6. Even if we assumed that the telegram of 1 July 1955 and the letter of 6 July 1955 together constituted the notice of termination, in our opinion the result would be the same. The letter of 6 July 1955 stated:

> "The above default action has been taken based upon your inability to meet an acceptable delivery schedule and to perform the contract in accordance with its terms, as indicated in part by your letter of 28 June 1955. Nothing contained in your letter of 28 June 1955 is considered to constitute an excuse for your failure in performance."

In the opinion of the Board the telegram and the letter, read together, do not specify that the default for which the contract is being terminated consists solely of one or more circumstances of the type listed in article 11(a)(ii).

65 7. For the reasons stated above, the Board is of the opinion that the instant case does not present the question as to whether a written notice of default which specifies only a failure to make progress (under article 11(a)(ii)) is to be held to have been a valid notice of default within the meaning of article 11(a) if the evidence shows (1) that no proper 10-day warning notice has been given as required under the provisions of article 11(a)(ii) but (2) that there existed, however, at the time of the issuance of the notice of termination an existing default consisting of a failure to make timely deliveries. We are of the further opinion, therefore, that the instant case does not present for decision

any question as to whether a notice of termination for default which specifies failure to make progress, and which is silent as to any failure to make deliveries, constitutes a waiver of the right to terminate for any such existing failure to make deliveries.*

8. Except to the extent that the above statements supplement and explain the findings and rulings contained in the Board's decision of 31 October 1955 the motion for reconsideration is denied, and the denial of the appeal is hereby affirmed.

Dated: 20 December 1955.

* * * * * * *

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* In reference to such a question the text and footnotes (with copious citations of cases) of secs. 742, 743, 744, and 839 of Williston's Law of Contracts (1936) would appear to be of considerable interest and value. See also David J. Joseph Company v. The United States, 113 C. Cls. 3, 13; Chevrolet Motor Co. v. Gladding, 42 Fed (2d) 440; cf. College Point Boat Co. v. United States, 267 U.S. 12, 15, 16.

68 UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Filed April 27, 1956] EXHIBIT 3

SOL O. SCHLESINGER Plaintiff	)	
vs.	)	Civil Action No. 1647-56
CHARLES S. THOMAS Secretary of the Navy Defendant	)	

AFFIDAVIT

District of Columbia, ss:

ALBERT C. KORNBLUM, being duly sworn, deposes and says:

1. I am an attorney at law employed by the United States Government and am Assistant to the General Counsel of the Navy Department.

2. In my official capacity, I give legal advice to the Chief of Naval Material and to personnel on his staff who have duties pertaining to the Consolidated List of Debarred, Ineligible and Suspended Contractors. In addition, I am a member of the Committee which has been authorized to represent the Secretary of the Navy in taking appropriate action regarding debarments in behalf of the Navy.

3. Subsequent to the debarment of Mr. Sol O. Schlesinger, doing business as Ideal Uniform Cap Company, Mr. Schlesinger has telephoned me on several occasions and has presented his views as to why he should not have been debarred and why the debarment should be lifted. In addition, on one occasion he and his attorney came to my office, Room 2034 Main Navy Building, Washington, D.C., conferred with me at length about the subject and stated their position in detail.

4. Upon information and belief, Mr. Schlesinger was afforded a personal conference with Hon. Raymond H. Fogler, Assistant Secretary of the Navy for Material. He has also spoken, in person and over
69 the telephone on two or more occasions, with Mr. William H. Moore, Mr. Fogler's Special Assistant for Procurement and with Mr. Albert H. Stein, Deputy General Counsel of the Navy. The subject of these discussions was the debarment and Mr. Schlesinger's protests.

5. Upon information and belief, Mr. Schlesinger has also conferred with Captain D.C. MacKenzie, USN, of the Bureau of Supplies and Accounts, and with other procurement officials at Navy Purchasing Office, Brooklyn, New York.

6. Deponent is of the belief that Mr. Schlesinger has had ample opportunity to present information for consideration in his behalf and that the Navy Department officials who are charged with responsibility in the matter of his debarment have been fully apprised of Mr. Schlesinger's position.

/s/ Albert C. Kornblum

Subscribed and sworn to before me this 27th day of April, 1956.

/s/ E. Riley Casey
Ass't U.S. Attorney

70 [Filed May 10, 1956]

SUPPLEMENTARY AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

STATE OF NEW YORK:
COUNTY OF SUFFOLK, ss:

Sol O. Schlesinger, first being duly sworn, deposes and says:

1. That he is the plaintiff in this cause and that this supplementary affidavit is made in support of a motion for preliminary injunction.

2. That based on his experience in the military uniform cap business, he knows that the bulk of the procurements for uniform caps are made by the Armed Forces before June 30th of each year.

3. That your affiant submitted a sealed bid on a procurement of 28,000 wool serge service caps under the Department of the Army invitation QM 36-030-56-590-(351) which was opened April 20, 1956, this bid being the second lowest bid submitted. On information and belief, there is good reason to believe that the lowest bidder will probably not qualify because he is delinquent in making deliveries under an existing Government contract. Because of the debarment action, your affiant's bid could not be considered if the lowest bidder is disqualified.

4. That he is submitting a sealed bid on a procurement of 375,012 enlisted men's wool serge caps to be made by the Philadelphia Quartermaster Depot of the United States Army, Invitation QM 679, bids for which are to be opened May 11, 1956. Deliveries are required to be made from January to June 1957. Unless the preliminary injunction is granted, his bid will not be considered.

71 5. The Navy cap requirements are largely covered by an invitation to bid which will be opened on May 25, 1956. This covers a requirement for 54,000 caps, with an option for an additional quantity of 54,000. Based upon previous experience, this would appear to be the Navy's principal requirement for its next fiscal year.

6. That unless the preliminary injunction is granted, he will be unable to participate in any of the procurements to be made before June 30,

1956, and, in effect, this will as a practical matter preclude the possibility of his obtaining any major military cap contracts until 1957.

7. That since 85% of the company's business prior to the debarment had been with the Government, there is grave doubt that the Ideal Uniform Cap Company could continue in business for any length of time if it is precluded from bidding on current Government military requirements. If a temporary injunction is not granted at this time, it is possible that the company might be out of business by the time the issues are finally determined, and even if the plaintiff is successful, it might be too late to give him the requested relief and vindication.

8. Manifestations of how the debarment has caused irreparable harm to your affiant are apparent from a reading of the affidavit of Murray F. Shapiro and the Dun and Bradstreet report which are annexed hereto.

/s/ Sol O. Schlesinger

Subscribed and sworn to before me this 8 day of May, 1956.

[Notarial signature and seal]

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72 STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

MURRAY F. SHAPIRO, being over the age of 21, deposes and says:

That he is president of Fraber, Inc., of 342 Madison Avenue, New York 17, New York.

That Fraber, Inc. is a duly licensed insurance broker.

That on or about August 15, 1955, and on various subsequent dates, Sol O. Schlesinger requested us to place for him a bid bond, to be filed with his bid for a government contract, as required by the government.

That Fraber, Inc. contacted practically every insurance company in New York to place the said bond.

That every insurance company contacted refused to write the said bond.

That every required condition for writing said bond was satisfactory

except that Sol O. Schlesinger was rated a moral risk from information obtained from his current Dun & Bradstreet report, which gave the information that he was debarred from Government contracts.

That at the present time it is still impossible to place a bid bond for Sol O. Schlesinger.

That on or about April 4, 1956, the Heffner Agency Inc. of 136 William Street, New York 38, N. Y., cancelled Sol O. Schlesinger's fire insurance in various companies, at the companies' request, indicating as the reason, that because Sol O. Schlesinger was debarred from Government contracts, he was a poor fire risk.

That many attempts were vainly made to replace the fire insurance.

That finally the fire insurance was placed in the Federal Insurance Company.

That a few days later the Federal Insurance Company advised Fraber, Inc. that they were recalling the fire insurance because inspection revealed that Sol O. Schlesinger was debarred from Government contracts, and this put his business in a precarious position, making him a poor fire risk.

Sworn to before me this

7th day of May, 1956. /s/ Murray F. Shapiro

/s/ Joseph J. Shapiro, Notary Public, State of New York * * *

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73 ANALYTICAL REPORT Rating Unchanged

Dun & Bradstreet, Inc.

2325 Ideal Uniform Cap Co. Schlesinger, Sol O., Owner	(A) CD 1 July 27 1955 MNFR Uniform Hats & Caps	Freeport, NY Nassau County 30 E Merrick Rd

RATING: --

Started: 1929 (Present control 1945) Payments: Disc to Ppt

Net Worth: $164,357 (2-28-54) Sales: $173,126 (yr ending 2-28-54)

SUMMARY

STATEMENT LATER THAN FEBRUARY 28, 1954 NOT AVAILABLE. INVESTIGATION DISCLOSES THAT ON JUNE 23, 1955, DURING TESTIMONY BEFORE A SENATE SUB-COMMITTEE, OWNER REFUSED TO PRODUCE CERTAIN BOOKS AND RECORDS REQUESTED BY COMMITTEE AND INVOKED THE "FIFTH AMENDMENT" ON GROUNDS THAT SUCH BOOKS AND RECORDS MIGHT TEND TO INCRIMINATE HIM. PUBLISHED NOTICE DATED JUNE 30, 1955 STATES U.S. NAVY ANNOUNCED IT WAS MOVING TO CANCEL A CONTRACT HELD BY SUBJECT AND TO PLACE THIS CONCERN ON ITS LIST OF "DEBARRED" CONCERNS.

HISTORY

Style, Ideal Uniform Cap Co., registered by Sol O. Schlesinger, on February 6, 1945 in New York City, and re-registered in Nassau County on July 27, 1948.

This firm is virtually a continuation of a business started 1929 by Joseph Schlesinger, father of Sol O. Schlesinger. The individual business of Joseph Schlesinger was succeeded by Ideal Uniform Cap Manufacturers, Inc., which was chartered under New York laws December 21, 1932, and in which Joseph Schlesinger was officer and together with his wife, sole stockholder. At the end of 1944 that corporation discontinued active business, reportedly paying obligations in full. The move was made to retire Joseph Schlesinger from active business. Sol O. Schlesinger then purchased the machinery and equipment of Ideal Uniform Cap Manufacturers, Inc., and $5,225 worth of the corporation's inventory.

Sol O. Schlesinger, married, born 1912. Has assisted his father all along, and for several years until purchasing this business, was general manager of Ideal Uniform Cap Manufacturers, Inc.

OPERATION - LOCATION

Products: Manufacturers a complete line of uniform hats and caps in a price range of $15. to $108 per dozen. (SIC # 2325).

Distribution: In the past, approximately 85% of volume was done directly with Government agencies. The balance of volume has been to

manufacturers and jobbers of uniforms and to large industrial organizations.

Territory: United States, with some exporting.

Terms: Commercial sales are on Net 10 days and Government terms are 5% 20th Net 30 days.

Seasons: No seasonal fluctuations.

Employees: Varies up to 200

Salesmen: Owner handles sales.

Facilities - Location: Occupies leased quarters measuring about 30,000 square feet on the first and second floors of a two story re-inforced concrete building in good repair. Operates 100 sewing machines, 25 compressed air machines, two conveyor belts, and 25 miscellaneous operating machines.

74 FINANCIAL INFORMATION

This business was started in 1929 by father of the present owner, who took over the business in 1945. Operations over the years have been moderately profitable, and retention of at least a portion of the annual earnings has expanded Tangible Net Worth, which reached a peak of $199,480 at February 28, 1953. However, during the year ending February 28, 1954 orders from the United States Army decreased substantially as there was a changeover in process in the style of uniforms. As a result the subject worked during that year principally on contracts for the United States Navy, which was somewhat less than the Army contracts. Volume showed a substantial decrease during that year, and a small loss was sustained which, when coupled with sizeable drawings by the owner, reduced Tangible Net Worth by close to $35,000.

The last figures available on this concern are those of February 28, 1954, summarized as follows:

Current Assets	$203,976
Total Assets	268,752
Current Liabilities	104,394
Net Worth	164,357
Net Sales	173,126
Net Loss	2,190
Withdrawals	32,932

As a matter of interest, the above summarized financial statement reflects cash and accounts receivable affording coverage to liabilities. Principal liability at statement date was a $100,000 bank loan, which the firm had obtained in December, 1953 to process a $350,000 Navy contract for hats. A good portion of this bank loan was used for the purchase of necessary inventory, which at February 28, 1954 was $82,088, as compared to $36,875 on February 28, 1953. Cash balances amounted to $55,399, and accounts receivable amounted to $62,588. Non-current assets consisted of fixtures and equipment $19,438, deferred charges and prepaid expenses of $5,338, and private home of $40,000. The accountants were Baylis & Baylis, C.P.A.'s, 120 West 42nd Street, New York City.

When interviewed October 4, 1954, Sol O. Schlesinger, stated that sales from February 28, 1954 to date of interview had increased about 100% as compared to the preceding year.

Current Investigation: Numerous efforts more latterly July 22, 1955 have been made to interview Sol O. Schlesinger since April, 1955. He has all along been reported absent from the premises, and requests left for an interview have gone unanswered. In outside quarters consulted, late financial details have not been made available.

According to published reports dated June 24, 1955, Sol Schlesinger, described as head of the Ideal Uniform Cap Co., Freeport, New York, testifying before the Senate Permanent Sub-Committee on Investigations on June 23, 1955, denied he had paid money to any officials to get a 1950 contract to make Air Force Caps. When asked by the Sub-Committee to produce certain books and records, Schlesinger refused to do so, and
75 invoked the "Fifth Amendment" on grounds that such books and records might tend to incriminate him because he is now being investigated by the Income Tax Agents.

Schlesinger also testified that during the past ten years, he had made $3,000,000 worth of caps for the Government, and that Government contracts constituted 85% of his business. According to the published notice, Senator John L. McClellan, Sub-Committee Chairman, announced

that he was asking the Pentagon to cancel a current contract on which Schlesinger's company was working. It was also indicated that the Sub-Committee Chairman asked the Pentagon to deny subject any further contracts in view of his refusal to answer questions about his financial affairs.

According to a published report dated June 30, 1955, the United States Navy announced on June 29, 1955, in a letter to Senator McClellan, Chairman of the Senate Permanent Sub-Committee on Investigations, that it was moving to cancel a contract for 50,000 blue sailor caps, held by Sol Schlesinger, and to place the subject concern on its list of "debarred" concerns.

TRADE INVESTIGATION

Following is the result of a trade survey completed March 21, 1955:

	High Credit	Owe	Past Due	Terms of Sale	Payments
1.	$ 5,000	--	--	1-10 N30	Discounts
2.	206	45	-0-	2-10 EOM	Prompt
3.	23	--	--	N 30	Prompt

BANKING RELATIONS

Accounts are maintained at one local and one New York City bank. At the New York City bank, which is the main bank, balances are in satisfactory proportions. Accomodation granted against both Government Contracts and on own paper with an amount owing. Relations have been satisfactory. At the local bank maintains a routine, non-borrowing payroll account.

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80 [Filed May 21, 1956]

MOTION FOR SUMMARY JUDGMENT

The plaintiff, Sol O. Schlesinger, moves the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for a summary judgment against the defendant, on the grounds that the pleadings herein and the affidavits and supporting documents filed in support and in opposition

to the Motion for Preliminary Injunction herein show that there is no genuine issue as to any material fact, and that the plaintiff is entitled to judgment as a matter of law.

* * * * * *

81 Plaintiff prays that this motion be referred for hearing and decision to the Honorable Matthew F. McGuire, United States District Court Judge, who previously has heard the Motion for Preliminary Injunction herein, and believes that if such request is granted, oral argument will be unnecessary unless desired by the Court of opposing counsel. Plaintiff prays for the immediate consideration of this motion because of the compounded irreparable harm being caused to plaintiff's reputation and business. Unless plaintiff is immediately permitted to compete for government business, his business may not be able to survive. Time is of the essence.

DIMOND AND THORMAN

By /s/ Solomon Dimond
Attorneys for plaintiff

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91 [Filed June 6, 1956]

MOTION FOR SUMMARY JUDGMENT

Comes now the defendant by his attorney, the United States Attorney, and moves this Honorable Court to enter summary judgment in its favor on the ground that there is no genuine issue as to any material fact, and that the defendant is entitled to judgment as a matter of law.

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92 ORDER

[Filed June 22, 1956]

This matter having come on pursuant to cross-motions for summary judgment and having been submitted without argument, and the Court having considered the motions and opposition thereto, it is this 22d day of June, 1956,

ORDERED AND ADJUDGED that the plaintiff's motion for summary judgment be and the same hereby is denied, and it is

FURTHER ORDERED AND ADJUDGED that the defendant's motion for summary judgment be and the same is hereby granted.

/s/ Matthew F. McGuire
United States District Judge

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93 [Filed June 29, 1956]

NOTICE OF APPEAL

Notice is hereby given this 29th day of June, 1956, that Sol O. Schlesinger, Plaintiff, hereby appeals to the United States Court of Appeals for the District of Columbia from the order of this Court entered on the 22nd day of June, 1956, denying plaintiff's motion for summary judgment and granting defendant's motion for summary judgment.

DIMOND AND THORMAN
By /s/ Burton R. Thorman
Attorney for Sol O. Schlesinger, Plaintiff

REPLY BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,483

SOL O. SCHLESINGER,
t/a Ideal Uniform Cap Company,

Appellant,

vs.

CHARLES S. THOMAS,
Secretary of the Navy,

Appellee.

United States Court of Appeals
For the
District of Columbia Circuit
FILED JAN 25 1957
Joseph W. Stewart
CLERK

APPEAL FROM A FINAL ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BURTON R. THORMAN
1011 New Hampshire Avenue
Washington 7, D.C.
Attorney for Appellant

Of Counsel:

Solomon Dimond
1011 New Hampshire Avenue, N.W.
Washington 7, D.C.

Robert I. Thiel, Printer
Washington, D. C.

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UNITED STATES COURT OF APPEALS

For The District Of Columbia Circuit

No. 13,483

SOL O. SCHLESINGER,
t/a Ideal Uniform Cap Company,

Appellant,

vs.

CHARLES S. THOMAS,
Secretary of the Navy,

Appellee.

APPEAL FROM A FINAL ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

I.

THE APPELLEE'S ARGUMENT THAT THE APPELLANT LACKS STANDING JUDICIALLY TO CONTEST THE DEBARMENT IS WITHOUT MERIT.

A reading of the Brief for the Appellee indicates that the appellee has misconstrued the entire theory of the appellant's case. It is the appellant's position that the debarment herein constituted a sanction imposed by the appellee without statutory, or even regulatory, authority. The appellee apparently does not contest the fact that a sanction has been imposed upon the appellant, but asserts that the appellant lacks standing to sue, relying on the authority of cases which indicate that statutes regulating Government contract procedures confer no enforceable rights upon persons dealing with it.

Assuming arguendo that the appellant would have no standing to sue if this were an action attacking the award of a contract or seeking an order directing the award of a contract, such is not the theory of the appellant's case. The sole issue herein is whether the appellee had the authority to debar the appellant. Or, stated another way, if the Department of the Navy had the authority to reject a bid submitted by the appellant on the ground that he was not a responsible bidder, did the appellee also have the legal authority to "blacklist" the appellant so that no Government agency could consider him as eligible for a contract, with the resultant ruination of his personal and commercial reputations because of the "blacklist"? It is appropriate to note that the District Court did not rule specifically on the question of whether the appellant had standing to sue. In fact, it gave no reason for its decision in granting appellee's motion for summary judgment.

Thd decision in Friend v. Lee, 95 App. D.C. 224, 221 F. 2d 96 (1955), upon which the appellee places so much reliance, is illustrative of this Court's recognition of the principle that while the courts may not review the award of a Government contract, this does not mean that any activity of the Government resulting from its contracting activities are beyond the scope of judicial review. In the Friend case, this Court held that the appellant therein had no standing to compel the cancellation of a contract granting an exclusive automobile rental concession at the National Airport to a competitor. However, the Court then went on to consider the companion claim that the appellant was being injured by the arbitrary and capricious manner in which the appellee was interpreting and applying regulations adopted for administration of the airport. The acts complained of followed by a few days the grant to the appellant's competitor of the exclusive franchise. The contract provided that the Government would not "permit any rental of driverless cars on the airport except by the Contractor," and the appellee had then taken the position that the appellant could not use public space at the airport to deliver cars reserved by airline passengers

prior to their arrival at the airport unless no receipts or papers were to be signed by the customer at the airport. This Court said (95 App. D.C. at p. 229):

> "We think that the plaintiff has made at least a prima facie showing that he is being subjected to unreasonable restrictions in the delivery of driverless cars to customers at the Airport, an activity which the defendants concede the plaintiff has the right to perform. Such conduct on the part of Government officials, if it has actually occurred, would be capricious and arbitrary. Where there is a threat of injury resulting from capricious or arbitrary performance of the regulatory functions of a Government agency, the Federal courts have in a wide variety of situations been ready to grant relief. * * *"

It is highly significant that the appeal in the Friend case was taken from a dismissal on the grounds that the plaintiff had no standing to sue and that in returning the case to the lower court for hearing, this Court observed (at p. 229) that it would not determine at that time whether the plaintiff had standing under section 10 of the Administrative Procedure Act (U.S.C.A. Title 5, Sec. 1009) "as a person suffering a legal wrong, i.e., the arbitrary destruction of his business", or whether the District Court could act in the exercise of its general equitable powers. The instant case was brought under both the jurisdictional grounds (J.A. 1).

As we noted in our main Brief (at page 14), the debarment has seriously affected appellant's commercial and personal reputations and has deprived him of some of the "working tools" of industry. His business has been seriously impaired. We submit, this is the very type of action which this Court had in mind in deciding the Friend case.

The appellee's comments that he does not see how expunging the debarment will help the appellant in any way (Brief of Appellee, p. 11) ignores completely the affidavits submitted by the appellant (J.A. 51-52) which show how the debarment resulted in cancellation of insurance, impaired appellant's credit and has brought a 75-year old business to the brink of ruin (see also pp. 13 and 14, Brief for Appellant). In

effect, the appellee urges the Court to shut its eyes to the effect of the debarment because, regardless of its unlawfulness, the effect of the attendant publicity cannot be overcome. It would be just as sound to argue that because a person convicted of crime may have served his sentence while an appeal was pending, there is no reason for an appellate court to consider the appeal. The record (J. A. 53-56) depicts graphically how the debarment was publicized by a credit reporting agency whose reports have wide circulation, and as the appellee notes, it was printed in Congressional reports. The debarment was also reported by the newspapers. Obviously, the courts could not require these various published reports to be expunged. But a ruling by the Court that the debarment was unlawful and a direction that the appellee expunge the records of his department accordingly would rectify the wrong in great part. We note again that in Peters v. Hobby, (1955), 349 U.S. 331, the Supreme Court directed that an unlawful debarment from employment be expunged from Government records even though reinstatement of the employees was not ordered, and even though the Court obviously could not "wipe" all the published reports of the debarment from the records.

It is to be further noted that as long as the records of the Departments of the Navy and Defense show that the appellant had been debarred, this ground may be used by any Government contracting officer as a basis for holding that the appellant is not a responsible bidder.

II.

THE ACTION OF THE APPELLEE IN DEBARRING THE APPELLANT WAS NOT AUTHORIZED BY ANY STATUTE OR REGULATION.

In Point II of appellee's brief, it is urged that the Armed Services Procurement Act, Act of February 19, 1948, c. 65, 62 Stat. 21, U.S.C.A. Title 41, Sec. 151 et seq., authorized the action of the Secretary in debarring the appellant. The sole language in the Act

upon which appellee predicates this argument is contained in Section 3 of the Act (quoted at page 7 of Brief for Appellant) which prescribes that awards made pursuant to advertisement for bids shall be to the responsible bidder whose bid will be most advantageous to the Government.

The appellee, in effect, urges that the authority to debar a bidder is equivalent to the authority to declare a bidder not responsible for the purpose of rejecting his bid. There is a clear and broad distinction between both the basis and the effect of debarment as distinguished from the irresponsibility of a bidder. A declaration that a bidder was ineligible because not responsible might result from any one of a number of business considerations, such as a lack of capital, equipment, facilities or trained personnel sufficient to perform a specific contract. Such irresponsibility may well not exist on a subsequent procurement when the bidder may have eliminated or cured the situation. Or possibly the new procurement might be small enough to be within his capabilities. Responsibility is a matter to be considered by each contracting officer on a case by case basis at the time of making the award, and evaluated according to the specific facts of each procurement. In fact, the Record (J.A. 16-17) contains some of the considerations which went into the determination of responsibility before the award of a contract to appellant. There is no stigma attached to a rejection of a bid on the basis that the bidder is irresponsible in connection with a particular requirement.

The basis and the effect of debarment, on the other hand, is entirely dissimilar. The debarred bidder may not be considered for an award of a contract (32 C.F.R. 1.601-1, quoted at page 31 of Brief for Appellant). There is no discretion reserved to the contracting officer who receives a bid from a debarred bidder to determine that it may be to the best interests of the Government to award the contract to him.

The appellee has taken the position that the Secretary has the discretionary authority "as custodian of public funds, to bar appellant's further receipt of Government contracts." (Brief for Appellee, p. 14) However, the practical effect of a debarment for one year is not to protect the Government, but to punish the contractor. This, in effect, is an illegal sanction. The Government's protection rests in its ability not to deal with irresponsible bidders on a continual basis.

In the face of this wide distinction, the appellee's position that "debarment" and "irresponsibility" are equivalent is not tenable. Furthermore, the grant of discretion by Congress to the "service concerned with the procurement" to determine whether a bidder is responsible could hardly be interpreted to extend to the issuance of a debarment notice which precludes the appellant from receiving contracts not only throughout the Department of Defense (J. A. 6), but is also effective throughout the Government.

In the absence of any specific directive by Congress in the Armed Services Procurement Act, supra, that a person or company may be debarred from receiving Government contracts, we submit the "responsible" bidder clause of the Act can only be interpreted to mean that in an individual advertised procurement, a service may determine that a bidder is not "responsible." Indeed, the section of Senate Report No. 571, 80th Cong. 2d Sess., quoted more fully by appellee at page 12 of his brief, states, in discussing this section of the Act:

> "* * * The question whether a particular bidder is a "responsible bidder" requires sound business judgment, and involves, an evaluation of the bidder's experience, facilities, technical organization, reputation, financial resources, and other factors." (Emphasis supplied.)

The right to reject a bid on the basis that the bidder is irresponsible does not create any legal authority to punish a prospective bidder for a fixed period of time.

It is clear that this particular section of the Act enunciates the sound business principle that when procurement is based upon advertising, the award shall be made to the lowest bidder. This section of the Act also makes it clear that the award itself is a ministerial act. The only discretionary power is granted to the contracting officer to determine if the bidder is responsible. Cf. McKay v. Wahlenmaier (1955), 96 App. D.C. 313, 325; 226 F 2d 35, 47. There is no authority spelled out for a sanction of debarment which could be imposed by the appellee.

In discussing the regulations which the appellee claims authorized him to debar the appellant, the appellee tacitly recognized that there was no regulation which specifically gave him authority to debar the appellant for pleading the Fifth Amendment to the Constitution. Appellee maintains, in effect, that he had carte blanche under Section 1.109-1 of the Armed Services Procurement Regulations, 32 C.F.R. 1.109-1, which authorizes deviations from the regulations "in individual cases, where special circumstances justify the deviation."

We submit, the deviation clause of the regulations, quoted at page 14, fn. 10, of appellee's brief, authorizes deviations only with respect to procurements, i.e, the award and administration of contracts. This interpretation is established not only by the language quoted by the appellee, but also by a recent revision of the applicable regulation. [1]

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1 Revision 13 of the ASPR clause 1-109 dated March 5, 1956, was reported in 21 Federal Register 5353 (July 18, 1956). It reads in part:

> "Sec. 1.109-2 DEVIATIONS AFFECTING ONE CONTRACT OR TRANSACTION. Deviations from this subchapter or a Department of Defense directive which affect one contract only or a single transaction in connection with one contract, may be made or authorized in accordance with Departmental procedures providing (a) special circumstances justify a deviation and (b) written notice of such deviations is furnished to the Assistant Secretary of Defense (Supply and Logistics) and to the other military departments. Such written notice shall be given in advance of the effective date of such deviations unless exigency of the situation requires immediate action."

The alleged right to deviate from the Armed Services Procurement Regulations is authorized when it relates to a contract. A debarment does not relate to a contract, but is a sanction or punishment precluding a person from bidding on Government requirements for a specific period of time. It is significant that the debarment notice quoted no authority for its issuance, and it was only as an after-thought when appellant raised a question regarding the authority to debar that this clause was resorted to. The appellee has never come forward with any evidence to support his argument that this "deviation" was authorized by higher authority or even reported to higher authority as required by the deviation section of the regulations.

In McKay v. Wahlenmaier, supra, this Court, in considering an argument by the Secretary of the Interior that since he devised the regulation in question, he had the right to say what the consequences of violating it shall be, held that it was unnecessary for it to reach that question, but that (96 App. D.C. at p. 321):

> "The Secretary is bound by his own regulation so long as it remains in effect. He is also bound, we think, to treat alike all violators of his regulation. He may not justify, simply by saying the violation is unimportant, his departure in a single case from an otherwise consistent policy of rejecting applications which do not conform to the regulation."

The appellee asserts that the second ground for debarment, to wit, claimed unsatisfactory performance, came within the scope of the regulations governing debarment. The appellant was not required to make delivery before June 30, 1955. However, on June 29, 1955, the Contracting Officer was directed by his superiors to terminate the contract for default. The contract was terminated on July 1, 1955. The record shows that the Navy knew that on June 30, 1955, the appellant had a substantial number of caps completed and ready for blocking (J. A. 27-28), and that he was in a position to make a substantial shipment within a few

days thereafter. As we noted previously (page 22-23 of Brief for Appellant), the Record fails to disclose "clear and convincing evidence of violation of the contract provisions," or even that the default was material or substantial.

There is something extremely repugnant to the democratic system when a Government officer may seize upon a technical default under a contract where no wilfullness is shown as justification to ruin a man's business. We submit, the regulations neither expressly nor impliedly provide for debarment under those conditions. Unless the appellee uniformly places each contractor who is in technical default on the "debarred" list, which appellee does not claim is the fact, his singling out of the appellant for such treatment is arbitrary and capricious. Cf. McKay v. Wahlenmaier, supra.

CONCLUSION

The appellant respectfully notes that the other arguments in appellee's brief are adequately answered by the Brief for Appellant, and submits that the judgment of the District Court should be reversed with directions to enter judgment for the appellant that the debarment was unlawful and the records of the Department of the Navy should be corrected accordingly.

Respectfully submitted,

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